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91-320

Case No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THOMAS V. BARNES, et al.

Defendants/Appellants,

v.

JAMES C. MATLOCK,

Plaintiff/Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals approved and sanctioned a depature by the trial court from the accepted and usual course of judicial proceedings and further decided a federal question in a way that conflicts with applicable decisions of this Court, by finding that the trial court's dismissal of the individual capacity suits after trial made resolution of the qualified immunity issue moot.

2. Whether the Seventh Circuit Court of Appeals decided a federal question which should be settled by this Court, by finding that the position of Legal Investigator was not a policymaking or confidential position.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Appellants petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the District Court with respect to Thomas Barnes and the City of Gary is reported at 932 F.2d 658 (7th Cir. 1991), (App. A., infra).

The order of the United States Court of Appeals for the Seventh Circuit finding that the dismissal of the individual capacity suit made resolution of the qualified immunity issue moot is not reported (App. B., infra).

The order of the District Court partially granting Respondents Motion for Summary Judgment and denying Petitioners' Motion for Summary Judgment is not reported (App. C, Infra).

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered on May 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This is an action arising under the First and Fourteenth Amendment to the United States Constitution and 42 U.S.C. Sec. 1983.

The Respondent, James Matlock, was employed with the City of Gary in the Law Department as a legal investigator. The Defendant Thomas V. Barnes was the duly elected Mayor of the City of Gary, an Indiana Municipality. As such,

he was the chief executive officer of the City of Gary and was responsible for appointing the Deputy Mayor, Corporation Counsel, and the Director of the Personnel Department of the City of Gary. (Tr., pg. 135).

Defendant Richard Comer was the appointed Deputy Mayor of the City of Gary. As such, he had oversight responsibility for the setting and implementation of policy established by the Mayor and was answerable to the Mayor of the City of Gary. (Tr., pg. 135). The Defendant Gilbert King was the appointed Corporation Counsel of the City of Gary having overall responsibility of the Law Department and was answerable to the Mayor of the City of Gary. The Defendant Beulah Ware was the appointed Director of Personnel of the City of Gary and as such she was responsible for implementing personnel decisions of the City of Gary

and was answerable to the Mayor of the City of Gary. The Defendant City of Gary was and is an Indiana municipal corporation. (Tr., pg. 136).

In the May primary election for Mayor in 1987, Barnes won the election from the incumbent Richard Hatcher. On April 30, 1988, Comer observed Matlock escorting and acting as part of a personal entourage of former Mayor Richard Hatcher. (Brief Exh. G).

Subsequently, Mr. Matlock was transferred from his position of Law Department Investigator to the position of Corrections Officer at the Gary City Jail because he was in a confidential, sensitive position with reference to live lawsuits involving the City, a number of which involved Mr. Hatcher. The Defendants lost confidence in Mr. Matlock as a result of Mr. Matlock escorting former Mayor Richard Hatcher in May of 1988. (Brief Exh. F, G

and H). In addition, Defendant King had instituted a new office procedure in which files were not locked and all employees had access to the files and materials contained therein in these sensitive files in the Law Department. (Brief Exh. H).

Further, department heads, the Mayor and the Common Council routinely requested opinions from the Corporation Counsel and his staff relative to the operation of city government on politically sensitive matters. (Brief Exh. H).

Although each employee had a specific job title, they often worked in conjunction with each other on the same cases: Therefore, an inter-working relationship was necessary for the effective operation of the Law Department. There were matters that were of a confidential nature that was being handled by the Law Department. (Tr., pg. 452) (Brief Exh. H).

Plaintiff Matlock filed this action against Defendants Barnes, Comer, King, and Ware in their individual and official capacities, and against the City of Gary alleging that to transfer from his position of Legal Investigator to the position of Jail Turnkey was in retaliation for his political support of former Mayor Richard Hatcher. On October 23, 1989, the District Court entered an Order finding (a) the decision of the Defendant, Richard Comer, Gilbert King, Jr., and Beulah Ware to transfer the Plaintiff was politically motivated; and (b) the Defendant, City of Gary, is liable for any decision made by the Defendant, Thomas Barnes as Mayor. The Court further denied Defendants' Motion for Summary Judgment regarding the Defendants' qualified immunity defense. On October 30, 1989, the Defendant filed a notice of appeal regarding the Defendants qualified immunity defense. On

defense. On November 6, 1989. Trial commenced and after a five-day trial, the Jury returned a verdict for Matlock against all Defendants. The Defendants objected to the verdict for the reason that they were entitled to qualified immunity because at the time of Matlock's transfer, the issue of politically motivated transfer had not been determined to be in violation of the First and Fourteenth Amendment. The District Court, upon motion of Plaintiff, dismissed the claims against the individual named defendant and entered Judgment against the City of Gary and the Defendants in their official capacities on January 9, 1990, the Court of Appeal ruled the Defendants Appeal Nos. 89-3380 and 89-3432 be dismissed as moot.

On May 15, 1991, while deciding the appeal of the entire case on its merits, the Court of Appeals for the Seventh Circuit adopted the previous interlocutory ruling

that the dismissal of the individual capacity suits made resolution of the qualified immunity issue moot.

CONSTITUTIONAL PROVISIONS INVOLVED

In its pertinent parts, the Constitution of the United States of America provides:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

In its pertinent parts, 42 U.S.C. 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

REASONS FOR GRANTING THE WRIT

A. The Seventh Circuit Court of Appeals approved and sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings and further decided a federal question in a way that conflicts with applicable decisions of this Court, by finding that the trial courts dismissal of the individual capacity suits after trial made resolution of the qualified immunity issue moot on appeal.

While considering a motion for Summary Judgment, the U.S. District Court for the Northern District of Indiana, sitting in Hammond, Indiana failed to squarely rule on the qualified immunity issue as raised by the Appellants herein. The Appellants claimed immunity based on the notion that there was no clearly established law that prohibited Appellants from transferring Appellee for political reasons. The District Court insisted on first determing whether the Appellee held a confidential and/or policy making position and on whether his transfer was for political

reasons. The trial court's threshold consideration should have been Appellant's qualified immunity claim that a patronage transfer was not, then, protected by the First Amendment. See, Harlow v. Fitzgerald, 105 S.Ct. 2727 (1982).

In further deviation from appropriate judicial procedure, the District Court, after failing to squarely rule on the qualified immunity issue as a question of law, dismissed the Appellants in their individual capacities after a five day trial, so that it would not have to decide the qualified immunity issue.

The Seventh Circuit sanctioned this unusual procedure by purporting to adopt an interlocutory appellate panel's determination, after all district court procedures were over, that the issue was moot as an interlocutory appeal. Matlock v. Barnes, 932 F.2d 658 (7th Cir. 1991).

The trial court further compounded said deviation, by instructing the jury that the issue of a political transfer was a question of fact, but using the already-imposed summary judgment against Appellants in their individual capacities as a springboard for liability against the City.

Moreover, the District Court determined Appellant's motive upon the motion for summary judgment held that three (3) of the four (4) individual Appellants transfered the Appellee for political reasons. It indirectly directed a verdict against the City of Gary. It instructed the jury that the City was liable if either Deputy Mayor Comer or Mayor Barnes was politically motivated. It had already determined on summary judgment that Deputy Mayor Comer was politically motivated.

In footnote 3 of its opinion, the Seventh Circuit declares the trial court's dismissal of the individual defendants a "win" for the individual defendants. Clearly the trial court did dismiss the individual claims, but only after the five (5) jury trial and the return of a verdict against all defendants. This belated dismissal did not undo the harm done by the use of the summary judgment to establish and mandate a verdict against the City and the individuals. This procedure, if allowed, would constantly permit a circumstance capable of repitition, yet evading review. Thus, this question is not moot. It is a case of justice delayed being justice denied.

Qualified immunity is the recognition of an entitlement not to stand trial, or face the other burdens of litigation, conditioned onthe resolution of the

essential legal question of whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. See Mitchell v. Forsyth, 472 US 511, 526 105 S.Ct 2806, 2815, 86 L.Ed.2d 411 (1985).

Such departure and the sanction of said departure from the usual course of judicial proceedings warrants this Court's supervision. A grant of review and reversal of the Circuit Court's decision would be appropriate.

The District Court and Court of Appeals decided a federal question in a way that conflicts with applicable decisions of this Court.

The District Court's failure to rule on whether the transfer of the Appellee for

political reasons violated clearly established law and simply holding the City liable for transfering him for political reasons is in conflict with this Court's precedent on the issue of qualified immunity. Said decision also arbitrarily rendered the Mayor and the City liable without fair adjudication on the merits. Neither the District Court nor the Court of Appeals ever decided whether the Appellee, at the time of his transfer, had a constitutional right under the First Amendment not to be transfered for political reasons. This issue is outcome determinative to the City's and/or the Mayor's liability. Neither the Mayor nor the City could be properly held liable, since Appellee had not shown clearly established right to be free from a patronage transfer.

This Court held in Mitchell v. Forsyth, supra, that a defendant who raises the qualified immunity defense is immune unless said defendant violated clearly established law. Mitchell is directly on point. At the time of the Mitchell defendant's conduct, there was no clearly established law which protected the Mitchell plaintiff from warrantless electronic surveillance. By Executive Order it was legal. This Court held that the defendant Mitchell was immune since at the time of alleged conduct, the issue of illegality had not been determined. Id. at pg. 2820. The focus in determining whether there is a violation of clearly established law is on the law as it existed at the time of the engaged activity. See Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982).

In the case at bar, neither the District Court nor the Court of Appeals

decided the federal question of qualified immunity consistently with this Court's decisions in Harlow or Mitchell. In order to hold the City of Gary liable for violating a right, the Court must first determine whether the right existed at the time of the alleged wrongdoing. Id. 102 S.Ct. 2727, 2738. The District Court and the Court of Appeals failed to make this determination.

The alleged conduct on the part of the Appellants took place in 1988. In 1990, this Court in Rutan v. Republican Party of Illinois, __U.S. __ 110 S.Ct. 2729 (1990), held, for the first time, that political transfers were violative of the First Amendment. In so doing, it reversed the Seventh Circuit's 1989 opinion which said that only victims of patronage discharges, actual or constructive, enjoyed First Amendment protection. Thus at the

time of the Appellee's transfer in 1988, there was no clearly established law which provided him First Amendment protection.

According to law from this Court, Appellants were entitled to a ruling on it's qualified immunity claim and a denial of the Appellants' Motion for Summary Judgment based on qualified immunity was an order entitling Appellants to an immediate appeal. See Mitchell v. Forsyth, 105 S.Ct. 2806 (1985). Even under prior Seventh Circuit decisions, whether or not Appellants chose to take an interlocutory appeal, Appellants could again raise the issue on appeal from a trial on the merits. Kurowski v. Krajewski, 848 F.2d 767 (7th Cir. 1988).

In focusing on whether the Appellee held policy making or confidential position rather than determining if a patronage

transfer violated clearly established law, the District Court and the Court of Appeals decided a federal question inconsistent with the decisions of this Court. In declining to decide on an appeal on the merits whether a patronage transfer was, at the time made, protected by the First Amendment, the Court compounded the inconsistency. [1]

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[1] Neither the District nor the Circuit Court seemed to distinguish adequately the patronage discharge cases in which non-exempt employees were accorded First Amendment protection under Elrod-Branti, and the case at bar which involved an alleged patronage transfer. Witness footnote 4 of the Circuit Court's opinion, which, in part, states:

> "It is sufficient that he, as a decisionmaker possessing final authority to establish Gary's policy, authorized Matlock's firing."

[Emphasis added.] In the instant case, it is clear that Matlock was not fired. He was transfered.

Finally, this issue is outcome determinative as to all Appellants. If the Appellee did not have a constitutional right not to be transfered for political reasons in 1988, the jury could not have properly been directed to hold the City of Gary liable for violating the alleged right claimed by the Appellee.

Otherwise, the City would stand liable - as it does now - for violating a First Amendment right that did not exist at the time.

B. Whether the Seventh Circuit Court of Appeals has decided a federal question which should be settled by this Court by its finding that the position of Legal Investigator was not a policy making or confidential position.

In Rutan v. Republican Party of Illinois, __ U.S. __ (1990), 110 S.Ct. 2729 (1990), the majority held that promotion, transfer and recalls based on political affiliation or support are

impermissible infringments on public employees' First Amendment Rights. This decision was handed down on June 21, 1990. On May 15, 1991, the Seventh Circuit Court of Appeals, in the instant case, held that a legal investigator could not be transferred for political reasons, since the position of Legal Investigator was not a policymaking or confidential position. The instant opinion is at odds with the Seventh Circuit's own opinion in Hudson v. Burke, 913 F.2d 427 (7th Cir. 1990). There, the Seventh Circuit held that Legal Investigators are policymakers if they provide "sufficient subjective imput into policy decision so that political affiliation was an appropriate considerate for his firing." Matlock, the plaintiff herein, had duties which were the same as those in Hudson, supra. Nonetheless, the Court of Appeals stated that there was

insufficent evidence about the policymaking nature of the legal investigator job and that the jury seemed not to believe defendants professed concern about breach of office confidentiality. (See, App. A-11) This result is exactly what concerned Justice Scalia in Rutan v. Republican Party of Illinois, supra, at 2729 (1990), where he stated:

> "Elrod allowed patronage dismissals of persons in 'policymaking' or 'confidential' positions . . . Branti retreated from that formulation, asking instead "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." . . . What that means is anybody's guess."

The opinion went on to state that:

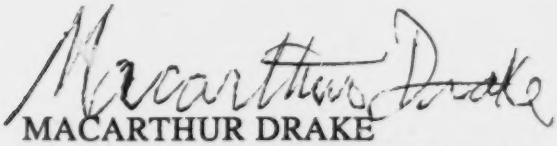
> "These interpretations of Branti are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision."

The opinion gave examples that illustrated the "shambles Branti has produced." As in the case at hand, the Seventh Circuit Court has not given the District Courts in its circuit any consistent guidance as to what is policymaking, confidential or when party affiliation is a permissible requirement. Here, we have a Legal Investigator in Chicago with the same duties and same input with a public official, as that of a Legal Investigator in Gary, 20 minutes away by car. Yet, one is exempt and the other is not. This Court should settle this confusion, not only in this circuit, but throughout the county by overruling Elrod, Branti, and Rutan, as Justice Scalia, Chief Justice Renquist, Justice Kennedy and Justice O'Connor professed in the dissenting opinion in Rutan, supra, at page 2756.

CONCLUSION

For all of the above reasons, the Petition for Writ of Certiorari should be granted and the Judgment and Order of the Court of Appeals should be reversed.

Respectfully submitted,



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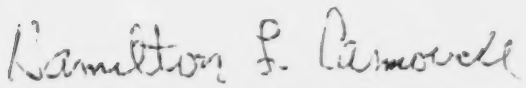

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-1047

JAMES C. MATLOCK,

Plaintiff-Appellee,

v.

THOMAS V. BARNES, in his capacity as the Mayor of the City of Gary, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. H88-673—**Andrew P. Rodovich**, *Magistrate.*

ARGUED JANUARY 22, 1991—DECIDED MAY 15, 1991

Before CUMMINGS, COFFEY and EASTERBROOK, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* James Matlock sued the city of Gary, Indiana, and four of its officials, including Mayor Thomas V. Barnes, alleging that he had been transferred from his job as a legal investigator for the city's Law Department in retaliation for his support of Barnes' political enemy, former mayor Richard Hatcher. Invoking 42 U.S.C. § 1983, Matlock sought damages for violations of his First

and Fourteenth Amendment rights. After a five-day trial,[1] the jury agreed with Matlock that his transfer was politically motivated and awarded him $5,307.58 in back pay and $20,000 in damages for emotional distress. Defendants appeal rulings made by the magistrate in response to their motion for summary judgment and the magistrate's refusal to enter a judgment notwithstanding the verdict. Defendants also challenge the jury's award of damages and attorney's fees.

FACTS

James Matlock began working as a legal investigator for the Law Department of the city of Gary in January 1972. The Department employed no more than eight staff members during Matlock's tenure. Most of the staff were attorneys; the number of investigators ranged from one to three. The work in the Department consisted mainly of investigating accidents and litigating small property damage claims brought against the city. According to a job description published by the city of Gary. Matlock's duties included: taking statements from witnesses in a legible manner, taking photographs of sites being investigated and obtaining medical and administrative records when necessary. Matlock apparently performed his job well, for his superiors never complained about the quality of his work during his sixteen years in the Department.

In May 1987, Richard Hatcher, who had been Gary's mayor since 1968, was defeated by Thomas Barnes in a hard-fought Democratic primary. Because of the Democratic party's lock on Gary politics, Barnes prevailed in the general election and took office in January 1988. As part of his new administration, Barnes appointed defendant Gilbert King, Jr., as the head of the Law Department. Defendant Beulah Ware became director of the Personnel Department and defendant Richard Comer was named deputy mayor.

[1] The trial was before a magistrate by consent of the parties.

Matlock had campaigned for Hatcher in the primary. On April 30, 1988, Matlock attended the annual Jefferson-Jackson Day dinner in Indianapolis, an affair hosted by the Indiana State Central Committee of the Democratic Party. He escorted former mayor Hatcher, who was at that time the vice-chairman of the Jesse Jackson presidential campaign, to his seat. When Matlock turned to leave, shortly after taking Hatcher to the front row of the hall, he stopped at a table to speak to a friend. Matlock tripped over the feet of deputy mayor Comer while leaning over to shake his friend's hand. Mayor Barnes was seated immediately to Comer's right.

On May 23, 1988, Ware, the Director of Personnel, notified Matlock that he was being transferred to the Gary City Jail to become a correctional officer, or "turnkey," and that his salary would be reduced from $15,192 a year to $11,635. Matlock started as a turnkey in June, though he had no training in the supervision of prisoners. He filed suit in December 1988 against the city of Gary, Barnes, Ware and King, alleging that he had been transferred for exercising his First Amendment rights of free speech and political association. He subsequently amended his complaint to add Comer as a defendant and to sue the officials in their individual as well as official capacities.

The defendants maintained below that Matlock was not transferred for political reasons. Comer admitted in his deposition that he had seen Matlock accompanying Hatcher at the Jefferson-Jackson Day dinner and had reported his observation to King and Ware. King acknowledged that he had discussed the possibility of transferring Matlock with the Mayor after the dinner. All defendants stated, however, that Matlock was not transferred for a public display of allegiance to the former mayor and his political faction, but because he had revealed a personal loyalty to Hatcher at a time when the Department was pursuing litigation against him. The defendants believe that Matlock had to be transferred to protect the confidentiality of the Department's files.

Both parties filed for summary judgment when discovery ended. The magistrate, in a thoughtful memorandum and order, declined to enter summary judgment for either party. He noted that genuine issues of material fact existed in particular about the nature of the legal investigator position. The Supreme Court has held that "policymaking" or "confidential" employees can be fired on political grounds, see *Elrod v. Burns*, 427 U.S. 347, and the magistrate believed that he could not accurately categorize Matlock's position as a matter of law. The magistrate did grant partial summary judgment to Matlock, finding that Comer, Ware and King had participated in Matlock's firing and that their actions were politically motivated. The court did not enter summary judgment on the question of Mayor Barnes' participation or motivation.

After a five-day trial, the jury returned a verdict for Matlock. The defendants, renewing an objection they had made in their motion for summary judgment, argued that they were entitled to qualified immunity in the individual capacity suits because the state of the law on politically motivated transfers was unclear at the time of Matlock's transfer. The plaintiffs offered to dismiss the individual capacity suits and as a result judgment was entered against all defendants in their official capacities and the city of Gary. Compensatory damages awarded by the jury totalled $25,307. The magistrate later awarded front pay in the amount of $7,500, costs of $1,354 and attorney's fees under 42 U.S.C. § 1988 of $57,675.

Defendants appeal the failure of the magistrate to enter summary judgment in their favor on the issue of whether Matlock's job was policymaking or confidential, the magistrate's partial grant of summary judgment to Matlock on the issue of the political motivation of Comer, Ware and King, and the magistrate's refusal to enter a judgment notwithstanding the verdict. Defendants also object to the amount of damages and attorney's fees awarded.

ANALYSIS

Whether Matlock's Job as a Legal Investigator Was a Policymaking or Confidential Position

In *Elrod v. Burns*, 427 U.S. 347, the Supreme Court held that a public employee cannot be fired because of his or her political beliefs unless political loyalty is an acceptable prerequisite for the job. In *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990), decided last Term, the Court held that transfers, promotions, and recalls after layoffs are governed by the same rule.

The prohibition on patronage practices is subject to an important exception. It is permissible to fire public employees who are likely to be formulating and implementing the policies of the party in power for lacking the correct political affiliation. The theory is that a newly elected administration has a legitimate interest in implementing the broad policies it was elected to implement without interference from disloyal employees. *Elrod*, 426 U.S. at 367. *Elrod* thus distinguishes employees who are either "policymaking" or "confidential" from non-policymaking, nonconfidential employees; the former can be dismissed for their political beliefs while the latter cannot. In *Branti v. Finkel*, 445 U.S. 507, the Court moved away somewhat from the "policymaking" and "confidential" labels, holding that public employees are protected from patronage dismissals if "party affiliation is an appropriate requirement for the effective performance of the office involved." 445 U.S. at 518.

This Court has characterized the *Branti* test as follows:

> The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking where there is room for principled disagreement on goals or their implementation.

Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981), certiorari denied, 455 U.S. 1021. We also have noted that

though a functional approach is now preferred to a definitional one, the descriptions " 'policymaking' and 'confidential' accurately describe the vast majority of offices that fall within the realm of legitimate patronage." *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985).

Since Matlock filed his suit, defendants have staked much of their defense on their argument that the legal investigator position Matlock occupied was policymaking and confidential and therefore that they were entitled to transfer Matlock even if they were motivated by his politics. They contend that Matlock can be called a "policymaker" because he exercised a great deal of discretion in how he carried out his investigations of suits pending in the Department. In addition, they maintain that a legal investigator position is "confidential" because the investigator has unlimited access to confidential files in the Department and that Matlock's continued presence in the office at a time when litigation was pending against former mayor Hatcher presented a threat to the integrity of the Department. The magistrate rebuffed defendants' argument about Matlock's policymaking, confidential status, first when he declined to enter summary judgment for defendants and later when he refused to enter a judgment notwithstanding the verdict.

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The magistrate's decision not to enter summary judgment for the defendants on the issue of the legal investigator's status was correct. We review the denial of summary judgment *de novo* and agree with the magistrate's assessment of the evidence. By its nature, the question of whether a job is policymaking or confidential is often factual. *Nekolny*, 653 F.2d at 1169. Here both sides apparently had neglected to describe in their affidavits and depositions the duties of the legal investigator. On the issue of confidentiality, a jury was entitled to weigh the credibility of defendants' proffered justification. Genuine issues of material fact persisted, and the magistrate rightly proceeded to trial.

Defendants' contention that they were entitled after trial to judgment on Matlock's policymaking, confidential

status is likewise without merit. Defendants moved for a directed verdict after close of the plaintiff's case and renewed their motion by asking for a judgment notwithstanding the verdict after the jury decided in favor of Matlock. The jury found in a special interrogatory that Matlock did not occupy a policymaking or confidential position. We review the denial of a motion for JNOV *de novo*, asking:

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In political patronage cases, defendants bear the burden of establishing that political affiliation is an appropriate qualification for the job from which plaintiff is ousted. *Elrod*, 427 U.S. at 368; *Grossart v. Dinaso*, 758 F.2d 1221, 1226 (7th Cir. 1985). The public employer must demonstrate the legitimate government interest in discharging the employee which overrides the encroachment on the employee's First and Fourteenth Amendment rights. *Elrod*, 427 U.S. at 368. Here the defendants tried to qualify for the *Elrod* and *Branti* exception by showing that Matlock's job was policymaking or confidential in nature.

At first glance, the duties of the legal investigator seem to have been too limited to qualify Matlock as a policymaker. A job that is merely ministerial is not "policymaking." See *Thulen v. Bausman*, No. 89-3627, slip op. at 7 (7th Cir. Apr. 22, 1991) (strictly menial government worker is clearly and completely protected from patronage firing). Matlock's office handled mainly small property claims against the city and accident investigations. Trial testimony established that Matlock accepted case assignments from the attorneys in the Department who super-

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-1047

JAMES C. MATLOCK,

Plaintiff-Appellee,

v.

THOMAS V. BARNES, in his capacity as the Mayor of the City of Gary, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H88-673—Andrew P. Rodovich, *Magistrate.*

ARGUED JANUARY 22, 1991—DECIDED MAY 15, 1991

Before CUMMINGS, COFFEY and EASTERBROOK, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* James Matlock sued the city of Gary, Indiana, and four of its officials, including Mayor Thomas V. Barnes, alleging that he had been transferred from his job as a legal investigator for the city's Law Department in retaliation for his support of Barnes' political enemy, former mayor Richard Hatcher. Invoking 42 U.S.C. § 1983, Matlock sought damages for violations of his First

and Fourteenth Amendment rights. After a five-day trial,[1] the jury agreed with Matlock that his transfer was politically motivated and awarded him $5,307.58 in back pay and $20,000 in damages for emotional distress. Defendants appeal rulings made by the magistrate in response to their motion for summary judgment and the magistrate's refusal to enter a judgment notwithstanding the verdict. Defendants also challenge the jury's award of damages and attorney's fees.

FACTS

James Matlock began working as a legal investigator for the Law Department of the city of Gary in January 1972. The Department employed no more than eight staff members during Matlock's tenure. Most of the staff were attorneys; the number of investigators ranged from one to three. The work in the Department consisted mainly of investigating accidents and litigating small property damage claims brought against the city. According to a job description published by the city of Gary, Matlock's duties included: taking statements from witnesses in a legible manner, taking photographs of sites being investigated and obtaining medical and administrative records when necessary. Matlock apparently performed his job well, for his superiors never complained about the quality of his work during his sixteen years in the Department.

In May 1987, Richard Hatcher, who had been Gary's mayor since 1968, was defeated by Thomas Barnes in a hard-fought Democratic primary. Because of the Democratic party's lock on Gary politics, Barnes prevailed in the general election and took office in January 1988. As part of his new administration, Barnes appointed defendant Gilbert King, Jr., as the head of the Law Department. Defendant Beulah Ware became director of the Personnel Department and defendant Richard Comer was named deputy mayor.

[1] The trial was before a magistrate by consent of the parties.

Matlock had campaigned for Hatcher in the primary. On April 30, 1988, Matlock attended the annual Jefferson-Jackson Day dinner in Indianapolis, an affair hosted by the Indiana State Central Committee of the Democratic Party. He escorted former mayor Hatcher, who was at that time the vice-chairman of the Jesse Jackson presidential campaign, to his seat. When Matlock turned to leave, shortly after taking Hatcher to the front row of the hall, he stopped at a table to speak to a friend. Matlock tripped over the feet of deputy mayor Comer while leaning over to shake his friend's hand. Mayor Barnes was seated immediately to Comer's right.

On May 23, 1988, Ware, the Director of Personnel, notified Matlock that he was being transferred to the Gary City Jail to become a correctional officer, or "turnkey," and that his salary would be reduced from $15,192 a year to $11,635. Matlock started as a turnkey in June, though he had no training in the supervision of prisoners. He filed suit in December 1988 against the city of Gary, Barnes, Ware and King, alleging that he had been transferred for exercising his First Amendment rights of free speech and political association. He subsequently amended his complaint to add Comer as a defendant and to sue the officials in their individual as well as official capacities.

The defendants maintained below that Matlock was not transferred for political reasons. Comer admitted in his deposition that he had seen Matlock accompanying Hatcher at the Jefferson-Jackson Day dinner and had reported his observation to King and Ware. King acknowledged that he had discussed the possibility of transferring Matlock with the Mayor after the dinner. All defendants stated, however, that Matlock was not transferred for a public display of allegiance to the former mayor and his political faction, but because he had revealed a personal loyalty to Hatcher at a time when the Department was pursuing litigation against him. The defendants believe that Matlock had to be transferred to protect the confidentiality of the Department's files.

Both parties filed for summary judgment when discovery ended. The magistrate, in a thoughtful memorandum and order, declined to enter summary judgment for either party. He noted that genuine issues of material fact existed in particular about the nature of the legal investigator position. The Supreme Court has held that "policymaking" or "confidential" employees can be fired on political grounds, see *Elrod v. Burns*, 427 U.S. 347, and the magistrate believed that he could not accurately categorize Matlock's position as a matter of law. The magistrate did grant partial summary judgment to Matlock, finding that Comer, Ware and King had participated in Matlock's firing and that their actions were politically motivated. The court did not enter summary judgment on the question of Mayor Barnes' participation or motivation.

After a five-day trial, the jury returned a verdict for Matlock. The defendants, renewing an objection they had made in their motion for summary judgment, argued that they were entitled to qualified immunity in the individual capacity suits because the state of the law on politically motivated transfers was unclear at the time of Matlock's transfer. The plaintiffs offered to dismiss the individual capacity suits and as a result judgment was entered against all defendants in their official capacities and the city of Gary. Compensatory damages awarded by the jury totalled $25,307. The magistrate later awarded front pay in the amount of $7,500, costs of $1,354 and attorney's fees under 42 U.S.C. § 1988 of $57,675.

Defendants appeal the failure of the magistrate to enter summary judgment in their favor on the issue of whether Matlock's job was policymaking or confidential, the magistrate's partial grant of summary judgment to Matlock on the issue of the political motivation of Comer, Ware and King, and the magistrate's refusal to enter a judgment notwithstanding the verdict. Defendants also object to the amount of damages and attorney's fees awarded.

ANALYSIS

Whether Matlock's Job as a Legal Investigator Was a Policymaking or Confidential Position

In *Elrod v. Burns*, 427 U.S. 347, the Supreme Court held that a public employee cannot be fired because of his or her political beliefs unless political loyalty is an acceptable prerequisite for the job. In *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990), decided last Term, the Court held that transfers, promotions, and recalls after layoffs are governed by the same rule.

The prohibition on patronage practices is subject to an important exception. It is permissible to fire public employees who are likely to be formulating and implementing the policies of the party in power for lacking the correct political affiliation. The theory is that a newly elected administration has a legitimate interest in implementing the broad policies it was elected to implement without interference from disloyal employees. *Elrod*, 426 U.S. at 367. *Elrod* thus distinguishes employees who are either "policymaking" or "confidential" from non-policymaking, non-confidential employees; the former can be dismissed for their political beliefs while the latter cannot. In *Branti v. Finkel*, 445 U.S. 507, the Court moved away somewhat from the "policymaking" and "confidential" labels, holding that public employees are protected from patronage dismissals if "party affiliation is an appropriate requirement for the effective performance of the office involved." 445 U.S. at 518.

This Court has characterized the *Branti* test as follows:

> The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking where there is room for principled disagreement on goals or their implementation.

Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981), certiorari denied, 455 U.S. 1021. We also have noted that

though a functional approach is now preferred to a definitional one, the descriptions " 'policymaking' and 'confidential' accurately describe the vast majority of offices that fall within the realm of legitimate patronage." *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985).

Since Matlock filed his suit, defendants have staked much of their defense on their argument that the legal investigator position Matlock occupied was policymaking and confidential and therefore that they were entitled to transfer Matlock even if they were motivated by his politics. They contend that Matlock can be called a "policymaker" because he exercised a great deal of discretion in how he carried out his investigations of suits pending in the Department. In addition, they maintain that a legal investigator position is "confidential" because the investigator has unlimited access to confidential files in the Department and that Matlock's continued presence in the office at a time when litigation was pending against former mayor Hatcher presented a threat to the integrity of the Department. The magistrate rebuffed defendants' argument about Matlock's policymaking, confidential status, first when he declined to enter summary judgment for defendants and later when he refused to enter a judgment notwithstanding the verdict.

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vised him, investigated claims by visiting accident sites, interviewing witnesses and taking pictures, and prepared written recommendations for the attorneys which they often adopted but were free to ignore. Matlock did not supervise anyone. He also did not have the authority to settle cases on his own. In sum, Matlock seems not to have had as much responsibility as other law enforcement personnel deemed by courts to be policymakers. See *Livas v. Petka*, 711 F.2d 798, 799-801 (7th Cir. 1983) (public prosecutor); *Thulen*, slip op. at 18 (deputy sheriff); *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981) (city solicitor).

However, as this Court recently noted in *Hudson v. Burke*, 913 F.2d 427 (7th Cir. 1990), even "investigators" can be policymakers if they provide "sufficient subjective input into policy decisions so that political affiliation was an appropriate consideration for hiring and firing." 913 F.2d at 432. *Hudson* involved clerks to the City of Chicago's Finance Committee who dealt mainly with "small issues like potholes and street lights." *Id.* The analysis in *Hudson* was not limited to considering the laundry list of plaintiffs' seemingly mundane duties. The defendants there established that partisan politics entered into many decisions of the Finance Committee, especially because it was "a powerful committee at a time of antagonism and divisive political turmoil." 913 F.2d at 434. They introduced evidence showing that the office's investigators performed "politically sensitive fact-finding missions," *id.*, that they contributed to the formulation of budget proposals and bond ordinances, 913 F.2d at 432, and that political affiliation had historically played a role in hiring in the office, *id.* In effect, the evidence tended to prove that even decisions about mending potholes could be political when Chicago's Finance Committee made them.

Defendants here utterly failed to introduce comparable evidence about the policymaking nature of the legal investigator's job in the city of Gary Law Department. Nowhere in the transcripts is there any suggestion that the Department regarded the settlement of the claims it

handled as political matters. There was no evidence that the Department made policy or set goals for the city of Gary. The defendants' witnesses testified that the Department did not hire or fire on the basis of political affiliation generally, suggesting that city officials considered jobs within the Department to be non-policymaking. Matlock himself testified that he could not have been hired for his political affiliation because at the time he applied for the job, he had none.

Defendants fare little better on their contention that Matlock occupied a "confidential" position. At trial, King testified that two cases were pending against former mayor Hatcher at the time Matlock escorted him to the Jefferson-Jackson Day dinner. After taking office, Mayor Barnes had sued Hatcher for allegedly removing all the Department's files when his administration departed. Also, several Hatcher appointees to the Gary Municipal Airport Authority District had sued Mayor Barnes and his administration after being terminated. King and the other defendants testified that because all employees of the Department had access to all court files, they lost confidence in Matlock's ability to safeguard the secrecy of the office upon seeing how close Matlock was to Hatcher. Defendants maintained that these facts proved the legal investigator job to be confidential within the meaning of *Elrod*.

Again, defendants' argument was not necessarily a losing one. Ordinarily "confidentiality," as that term is used in *Elrod*, connotes a need for political loyalty, not merely a worker's duty to keep the secrets of his or her office. This Court has expressed doubt that "any access to court records when coupled with political animosity creates a serious threat of politically motivated breaches of confidentiality." *Meeks*, 779 F.2d at 421 (court bailiff is not confidential employee merely because he has access to confidential information). Nonetheless in *Meeks* itself we recognized that there are situations, especially in small offices where constant face-to-face contact is required, in which "political animosity, while not a noble basis for discharging an employee, can in practice create a hostile

work environment." *Meeks*, 779 F.2d at 423. In these cases, "it would strain credulity to read the First Amendment or *Elrod* to require an elected official to work in constant direct contact with a person viewed as a political enemy." *Id.* See also *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir. 1985) (jury question exists as to whether political affiliation is proper qualification for job as sheriff's secretary in six-person office), certiorari denied, 471 U.S. 1117. In Matlock's case, defendants could have established the confidentiality of Matlock's position by offering convincing proof of their unease about working in small quarters in direct and constant contact with Matlock, a Hatcher-backer.

The jury seems simply not to have believed defendants' professed concern about breaches of office confidentiality, however. The evidence supports their conclusion. Matlock cast doubts on defendants' supposedly grave efforts to limit access to information about the proceedings against Hatcher. The case against Hatcher regarding the missing files was not being handled by any attorney in the Department, but by outside counsel. Furthermore, the Department had taken no action to prevent other Hatcher loyalists from obtaining or disseminating confidential information regarding the case. Alton Gill, who had been Hatcher's corporation counsel, had access to the same court files Matlock did. He had entered private practice after resigning from the Department and shared office space with the outside attorney representing the city in the case against Hatcher. The city never had expressed any concern about Gill's ability to compromise the city's case. Finally, some of the evidence indicated that the Department did not even care to pursue its litigation against Hatcher, much less protect information arising from the case. The Department had been so lax in litigating the case that it was facing a motion to dismiss for failure to prosecute.

Perhaps the most influential facts were the ones directly related to Matlock and his transfer. Matlock had never before breached the security of the Department. Until he

was transferred, no one in the office had ever expressed concern to him about his association with Hatcher and the possible confidentiality problems raised by that association. This was in spite of the fact that Ware and King knew of Matlock's loyalties before Matlock appeared in public as Hatcher's escort.

The jury was in the best position to assess the credibility of the defendants' arguments about the need for secrecy in the Department, and its finding that Matlock's position was non-confidential as well as non-policymaking will not be overturned. Nothing in the record demonstrates that the legal investigator position was generally one for which political affiliation is an appropriate requirement. Defendants are not entitled to a judgment notwithstanding the verdict on the basis of Matlock's status.

Whether Matlock Was Fired for his Political Affiliation

A public employer can escape liability for what seems to be a politically motivated employment decision by showing that it would have reached the same employment decision even in the absence of the protected conduct. *Mt. Healthy School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 287. In other words, the public employer can advance legitimate, non-political reasons for its decision.

Magistrate Rodovich precluded jury investigation into the motives of defendants Comer, Ware and King by awarding partial summary judgment to Matlock on the issue of whether their actions were politically motivated. Defendants argue that this question should have gone to the jury, because their affidavits raised a genuine issue of material fact as to whether Matlock was transferred merely for making a political statement or because his superiors "lost confidence" in Matlock's ability to perform his job adequately after learning that he was personally close to someone against whom the Department had litigation pending.

While we are inclined to agree that the question of motivation, like that of the status of the legal investigator, should have been tried, we are precluded from reviewing defendants' argument. The suits against Comer, Ware and King have been rendered moot by defendants' failure to appeal successfully from the jury verdict against Barnes and the city. The only suits remaining in this case are those against the officials in their official capacities.[3] The city of Gary thus is the only defendant whose assets can be used to satisfy judgments rendered against any of the defendants. "[A] plaintiff seeking to recover on a damages judgment in an official capacity suit must look to the government entity itself," *Kentucky v. Graham*, 473 U.S. 159, 166, because an official capacity suit "is, in all respects other than name, to be treated as a suit against the entity." *Id.* The jury found Mayor Barnes and the city of Gary liable for the politically motivated transfer of Matlock,[4] and the defendants do not successfully challenge

[3] Defendants include in their brief an argument that they should have been granted summary judgment on grounds of qualified immunity. Defendants previously filed two interlocutory appeals raising this same issue. We consolidated the two appeals and dismissed them, finding that the dismissal of the individual capacity suits made resolution of the qualified immunity issue moot. *Matlock v. Barnes, et al.*, Nos. 89-3386 and 89-3432 (7th Cir. Jan. 9, 1990) (unpublished order dismissing consolidated interlocutory appeals). We adhere to this ruling. Now defendants make the rather novel argument that the magistrate prejudiced them by allowing them to prevail in their individual capacity suits. Defendants believe that they were entitled to a judgment absolving them of wrongdoing and that plaintiff's voluntary dismissal deprived them of this ability. Defendants might have preferred a victory on the merits rather than a victory due to plaintiff's capitulation. A win is a win, however, and defendants cannot appeal from a judgment that is not adverse.

[4] Defendants halfheartedly argue that the Barnes administration had no widespread policy of transferring city employees who supported Hatcher's faction. While it is true that municipal liability can derive only from a municipality's policy or custom, see *Monell v. Department of Social Services*, 436 U.S. 658, 671, liability can

(Footnote continued on following page)

these verdicts. This means that the city is in any case liable for the amount of the judgment award. Reversing the partial summary judgment entered against Comer, King and Ware would be pointless,[5] because further proceedings could only investigate a matter already tried: whether the city is liable for Matlock's transfer. Because any decision on our part cannot change Matlock's right to recovery or the city's liability, the issue of whether Comer, Ware and King were politically motivated in transferring Matlock is moot. See *North Carolina v. Rice*, 404 U.S. 244, 246 (federal courts cannot decide questions that cannot affect the rights of the litigants in the case before them).

The judgments entered against Comer, Ware and King are vacated and the magistrate is instructed to dismiss the suit against these parties. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (proper disposition if case becomes moot en route to appellate court is to reverse or vacate judgment below and remand with direction to dismiss).

Damages

Defendants believe that Matlock was not entitled to the full amount of lost wages, $5,307, because he failed to mitigate those damages. They also argue that the jury

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[4] *continued*
be imposed for a "single decision by municipal policymakers under appropriate circumstances." *Pembaur v. Cincinnati*, 475 U.S. 469, 480. Thus it makes no difference that Barnes generally did not fire or transfer employees for their political affiliations. It is sufficient that he, as a decisionmaker possessing final authority to establish Gary's policy, authorized Matlock's firing.

[5] Perhaps the most graphic way to illustrate the lack of interest that Comer, Ware and King personally have in the outcome of the official capacity suits is to note that their death or replacement would result merely in the substitution of their successors. *Kentucky v. Graham*, 473 U.S. at 166 n. 11.

award of $20,000 for emotional distress was unsupported by the evidence.

The jury's judgment that Matlock was under no duty to mitigate damages is not contrary to the weight of the evidence. Defendants bore the burden of showing that Matlock failed to exercise reasonable diligence to mitigate damages and that Matlock was likely to have found comparable work. *Hanna v. American Motors Corp.*, 724 F.2d 1300 (7th Cir. 1984), certiorari denied, 467 U.S. 1241. The obligation to mitigate is largely an inquiry into "reasonableness" which is properly within the province of the jury. *Smith v. Rowe*, 761 F.2d 360, 367 (7th Cir. 1985). Matlock testified that after he was involuntarily transferred, he showed up for work at the Gary jail and continued to work there 40 hours a week at the 4:00 P.M. to midnight shift. He also stated that after his transfer he performed investigatory work on a part-time basis when not working at the jail. From these facts a juror might conclude that Matlock had already done what reasonably was possible to mitigate damages. Defendants, for their part, introduced no evidence demonstrating that more effort on Matlock's part would have resulted in his finding comparable work at his old salary.

The $20,000 damage award for emotional distress likewise withstands the defendants' attacks. We cannot vacate an award for excessiveness unless it is "monstrously excessive" or there is "no rational connection between the evidence on damages and the verdict." *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983). Also, it is necessary to consider whether the award is excessive in comparison to other awards in similar cases. *Levka v. City of Chicago*, 748 F.2d 421, 425 (7th Cir. 1984).

Defendants contend that the jury award in this case is unsupported because Matlock's direct commentary about his emotional distress was limited to his testimony that he had preexisting hypertension problems and that his new job was "too stressful" (Tr. at 196-197). They compare this case to *Nekolny*, in which this court vacated

awards of $5,000 and $2,000 to two plaintiffs for mental and emotional distress on the grounds that "a single statement by a party that he was 'depressed,' 'a little despondent,' or even 'completely humiliated' * * * is not enough to establish injury" in the absence of other facts indicating emotional injury. *Nekolny*, 653 F.2d at 1172-1173.

This case is easily distinguished from *Nekolny* because Matlock introduced many facts from which the jury could gauge the emotional distress and personal indignity he suffered. The jury heard testimony about Matlock's sixteen-year tenure in the Law Department and the level of competence and independence he had attained within the office. They were then able to compare the legal investigator job with Matlock's new job in the city jail, where he was responsible for feeding and moving prisoners. The jurors were not obliged, as in *Nekolny*, to take plaintiffs' vague utterances about indignity and humiliation as gospel. They could themselves arrive at an estimation of plaintiff's loss, by comparing the circumstances of Matlock's life and work before and after his transfer.

The $20,000 award is also not excessive in comparison to awards in similar cases. In *Webb v. City of Chester*, 813 F.2d 824, 836 (7th Cir. 1987), this Court found that awards in cases where plaintiff had been fired ranged from a "low of $500 to a high of over $50,000." In *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989), involving police officers transferred out of their unit to another unit within the Police Department, we noted that though $55,000 was clearly excessive for emotional distress, a remittitur to $15,000 would be reasonable.

The jury awards with respect to back pay and emotional distress are upheld. Both are supported by the evidence and the emotional distress award is not excessive in amount.

Attorney's Fees

Finally, defendants argue that the district court abused its discretion in awarding $57,675 in attorney's fees to Matlock's attorney under 42 U.S.C. § 1988. They believe

the amount is "excessive and inordinate" (Def. Br. 43), mainly because it includes the fees attributable to work on claims on which defendants prevailed.

Under 42 U.S.C. § 1988, a plaintiff may be awarded reasonable attorney's fees as a prevailing party if he or she succeeds on "any significant issue in litigation which achieves some of the benefit sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433. The defendants here thus cannot complain that they are being charged for the preparation and presentation of some claims which plaintiff ultimately lost, for example the claims against defendants in their individual capacities. Matlock is the prevailing party by the definition set forth in *Hensley*.

The magistrate conducted an in-depth evidentiary hearing before accepting plaintiff's fee petition. He reviewed the detailed petition, heard testimony about the reasonableness of the hourly rates of plaintiff's attorneys, considered case law on the subject of attorney's fees, and patiently heard defendants' objections. We cannot say that he abused his discretion.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed with respect to Thomas Barnes and the city of Gary. The judgments against Comer, Ware and King are vacated and the district court is directed to dismiss the suits against these three officials.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 9, 1990
No. 89-3386 and 89-3432

Before

HON. WILLIAM J. BAUER, CHIEF JUDGE
HON. DANIEL A. MANION, CIRCUIT JUDGE
HON. MICHAEL S. KANNE, CIRCUIT JUDGE

JAMES C. MATLOCK
Plaintiff-Appellee,

vs.

THOMAS V. BARNES,
etc., et. al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northen District of Indiana, Hammond Division
No. 88 C 673. Judge Andrew P. Rodovich

This matter comes before the court for its consideration of the following:

1. "DEFENDANTS"/APPELLANTS' REPORT OF STATUS OF DISTRICT COURT PROCEEDINGS" filed November 17, 1989.

2. PLAINTIFF-APPELLEE, JAMES C. MATLOCK'S STATUS OF PROCEEDINGS" filed November 17, 1989.

3. "MOTION TO RECONSIDER DEFENDANTS'/APPELLANTS' MOTION TO - STAY AND FOR EXPEDITED APPEAL" filed November 17, 1989.

4. "PLAINTIFF-APPELLEE'S RESPONSE TO THE MOTION TO RECONSIDER DEFENDANTS'/APPELLANTS' MOTION TO STAY AND FOR EXPEDITED APPEAL' filed November 28, 1989.

5. APPELLANTS' STATEMENT OF POSITION RELATIVE TO THE EFFECT OF HEDGE V. COUNTY OF TIPPECANOE, No. 88-2630, filed December 13, 1989.

6. "APPELLEE'S STATEMENT OF POSITION RELATIVE TO THE EFFECT OF HEDGE V. COUNTY OF TIPPECANOE; No. 88-2630, filed December 26, 1989.

The orders forming the basis of these consolidated interlocutory appeals address a claim of qualified immunity. On November 9, 1989, we denied the defendants' emergency motion for stay of the district court proceedings pending appeal of the immunity issue, finding that the defendants, by failing to raise the qualified immunity claim until the eve of trial, had forfeited their right to a pre-trial appeal. See Apostle v. Gallion, 870 F.2d 1335 (7th Cir. 1989). In the same order, we directed the parties to keep us apprised of the status of the district court proceedings.

In their status reports, the parties advised the court that the jury entered a verdict in favor of the plaintiff against all of the defendants in this action. After the verdict was returned, the plaintiff moved to voluntarily dismiss the

defendants, who had been sued in both their official and individual capacities, in their individual capacities. The district court granted that motion and entered judgment against the City of Gary and other defendants in their official capacities only. We then directed the parties to advise us as to whether these interlocutory appeals were moot since the defendants, who remained in the suit in their official capacities only, would be unable to assert a claim of qualified immunity.

Having reviewed the parties' submissions in response to our orders, we conclude that the qualified immunity claim forming the basis of these interlocutory appeals is now moot. See Hedge V. County of Tippecanoe, No. 88-2630, slip op. at 7-9, n.5 (7th Cir. Nov. 17, 1989). Accordingly,

IT IS ORDERED that these consolidated appeals are DISMISSED as Moot.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JAMES C. MATLOCK

v. CASE NO. H88-673

THOMAS BARNES,
et al.

SUPPLEMENTAL JUDGMENT IN A CIVIL CASE

(to the judgment entered 11/10/89)

DECISION OF COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that costs are GRANTED in the amount of $1,354.40.

Attorney Fees are GRANTED in the amount of $57,676.00.

The Petition for Reinstatement is DENIED.

Court GRANTS $7,500.00 in front pay for plaintiff.

(Current interest rate is 7.66%)

December 15, 1989
Date

RICHARD E. TIMMONS
Clerk

/s/ Paul Kennedy
(By) Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JAMES C. MATLOCK

v. CASE NO. H88-673

THOMAS BARNES,
et al.

JUDGMENT IN A CIVIL CASE

JURY VERDICT: This action came before the Court for a trial jury. The issues have been tried and the jury has rendered its verdict.

DECISION OF COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, JAMES C. MATLOCK, and against the defendants, THOMAS BARNES, in his capacity as the Mayor of the City of Gary; GILBERT KING, JR., as City Attorney of the City of Gary; BEULAH WARE, as Director of the Personnel Department for the City of Gary; RICHARD COMER, in his capacity as the Deputy Mayor of the City of Gary; and THE CITY OF GARY, an Indiana Municipal Corporation and assess compensatory damages in the total amount of $25,307.58.

On October 13, 1989, it was Ordered that Count II of the complaint be Dismissed.

On October 23, 1989, it was Ordered that the Motion for Summary Judgment filed by the plaintiff on October 6, 1989 is GRANTED IN PART: (a) The decision of defendants, Richard Comer, Gilbert King, Jr., and Beulah Ware, to transfer the plaintiff was politically motivated; and (b) the defendant, the City of Gary, is liable for any decisions made by the defendant, Thomas V. Barnes, as mayor. In all other respects, the Motion For Summary Judgment is Denied.

On November 10, 1989, it was Ordered that plaintiff's Motion to dismiss defendants, Thomas Barnes, Richard Comer, Gilbert King, Jr. and Beulah Ware in their individual capacities be Granted.

(Current interest rate is 7.90%)

November 10, 1989
Date

Richard E. Timmons
Clerk

/s/ Joan R. Holderman
(By) Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CASE NO. H88-673

JAMES C. MATLOCK

Plaintiff

v.

THOMAS BARNES, Individually, and in his capacity as the Mayor of the City of Gary; RICHARD COMER, Individually, and in his Capacity as the Deputy Mayor of the City of Gary; GILBERT KING, JR., Individually, and as City Attorney of the City of Gary; BEULAH WARE, Individually, and as Director of the Personnel Department for the City of Gary; and THE CITY OF GARY, an Indiana Municipal Corporation,

Defendants

ORDER

This matter is before the Court on the Motion for Summary Judgment filed by the plaintiff, James C. Matlock, on October 6, 1989 and the Motion to Dismiss and/or for Summary Judgment filed by the defendants on October 11, 1989. For the reasons set forth below, the Motion for Summary Judgment filed by the plaintiff is GRANTED

IN PART, and the Motion for Summary Judgment filed by the defendants is DENIED.

Background

The plaintiff, James C. Matlock, was employed as a legal investigator in the Law Department of the City of Gary from January, 1972 through May 30, 1988. In May, 1987, the incumbent mayor, Richard Gordon Hatcher, was opposed in the Democratic primary by the defendant, Thomas V. Barnes. Matlock actively supported Hatcher in the primary. Barnes defeated Hatcher, won the general election, and became mayor on January 1, 1988.

As part of his new administration, Barnes appointed the defendant, Gilbert King, Jr., as head of the Law Department on January 1, 1988. Barnes also appointed the defendant, Beulah Ware, as the director of the Personnel Department and the defendant, Richard Comer, as deputy mayor. Prior to

their appointments, both King and Ware had been active in Barnes' mayoral campaign. Additionally, at one time Barnes and King were law partners, and Ware had been the administrative assistant to Barnes in his previous job as Calumet Township Trustee.

Matlock was terminated when King first took charge of the Law Department. However, Barnes, Comer, Hatcher, and Matlock all attended the annual Democratic party Jefferson-Jackson Day dinner in Indianapolis on April 30, 1988. At that time, Hatcher was a vice-chairman in the Jesse Jackson presidential campaign. When Matlock escorted Hatcher to his assigned seat at the dinner, Barnes and Comer witnessed the incident.

Matlock had not received any deficiency notices concerning his job performance either before or after King became head of the Law Department. On Approximately May 23, 1988, Ware notified Matlock that he

would be transferred to the Gary City Jail as a correctional officer and that his salary would be reduced. Matlock had no prior experience as a correctional officer. Other factual issues will be discussed in more detail as they relate to the pending motions for summary judgment.

As a result of his job transfer and salary reduction, Matlock filed a complaint on December 20, 1988, alleging that the defendants conspired to transfer him from his position as the legal investigator and to reduce his salary in retaliation for the exercise of his First Amendment rights of free speech and political association. Matlock alleges that he has suffered and will continue to suffer humiliation and mental anguish, loss of income, and a chilling effect on the exercise of his constitutionally protected rights.

Discussion

In his Motion for Summary Judgment,

Matlock contends that the undisputed evidence has established that his transfer was for political reasons; that the job of investigator was not a confidential position; and that the office of mayor is a policymaking position which makes the City responsible for the mayor's involvement in the transfer. In their Motion for Summary Judgment,[1/] the defendants contend that Matlock occupied a confidential position and could be terminated for political reasons;

1/ The defendants also raise a variety of issues in the Motion to Dismiss. On June 7, 1989, this Court entered an Order denying the Motion to Dismiss which was filed in response to the original Complaint on March 14, 1989. When the plaintiff filed an Amended Complaint, the defendants filed another Motion to Dismiss on July 17, 1989 raising identical issues. On September 1, 1989, this Court again denied the Motion to Dismiss based upon the June 7th order. The most recent Motion to Dismiss is directed to the Second Amended Complaint filed by the plaintiff and raises the same issues. For the reasons stated in the June 7th order, that Motion again is DENIED.

that they are entitled to qualified immunity; and that the City is not liable for the conduct of the individual defendants.[2/] Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only if it is demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." McGraw-Edison v. Walt Disney Products, 787 F.2d 1163, 1167 (7th Cir. 1985(; and Big O Tire Dealers, Inc. v. Big O Warehouse, 741 F.2d 160, 163 (7th Cir. 1984).

2/ The Motion for Summary Judgment also referes to the plaintiff's Fourteenth Amendment claim. In the Second Amended Complaint, Matlock referred to a violation of his First and Fourteenth Amendment rights. The protections of the First Amendment have been made applicable to the States through the Fourteenth Amendment. Kurowski v. Krajewski, 848 F.2d 767, 769 (7th Cir. 1988). Since the plaintiff has not alleged any other Fourteenth Amendment deprivations, it is not necessary to discuss whether Matlock had a property interest or whether he was deprived of that property interest without due process.

The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt as to the existence of a genuine issue must be resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 160, 90 S.Ct. 1598, 1610, 26 L.Ed.2d 142, 155 (1970); and Munson v. Friske, 754 F.2d 683, 690 (7th Cir. 1985). A fact is material if it is outcome determinative under applicable law. Shlay v. Montgomery, 802 F.2d 918, 920 (7th Cir. 1986); and Big O Tire Dealears, Inc., 741 F.2d at 163. Even if the facts are not in dispute, summary judgment is inappropriate when the information before the court reveals a good faith dispute as to inferences to be drawn from those facts. Powers v. Dole, 782 F.2d 689, 694 (7th Cir. 1986); Munson, 754 F.2d at 690, and Burns v. Rockford Life Insurance Company, 740 F.2d 542, 546 (7th Cir. 1984). Finally, summary judgment generally is not an appropriate means of resolving questions of motive and intent.

Bartman v. Allis-Chalmers Corporation, 799 F.2d 311, 312 (7th Cir. 1986); P.H. Glatfelter Company v. Voith Incorporated, 784 F.2d 770, 774 (7th Cir. 1986); and Munson, 754 F.2d at 690.

In deciding a motion for summary judgment, the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such a reasonable jury might find in favor on that party after a trial.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that property can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> (T)his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge just direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986).

See also: Celotex Corporation v. Catrett,

477 U.S. 317, 322-23, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 273 (1986); Baker v. Henderson, Franklin, Starnes & Holt, F.2d 432, 436 (7th Cir. 1986).

FIRST AMENDMENT CLAIM

Non-policymaking, non-confidential government employees cannot be discharged solely for exercising their First Amendment freedoms such as political beliefs, expression and association. Branti v. Finkel, 445 U.S. 507, 517, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574, 583 (1980). Elrod v. Burns, 427 U.S. 347, 375, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547, 566 (1976); Livas v. Petka, 711 F.2d 798, 800 (7th Cir. 1983); and McClure v. Cywinski, 686 F.2d 541, 544 (7th Cir. 1982). However, policymaking or confidential employees can be fired on political grounds without violating the employees' First Amendment rights. Branti, 445 U.S. at 517, 100 S.Ct. at 1294, 63 L.Ed.2d at 583; Elrod, 427 U.S. at 367, 96

S.Ct. at 2686, 49 L.Ed.2d at 562; Soderbeck v. Burnett County, Wisconsin, 572 F.2d 285, 288 (7th Cir. 1985); Shakman v. Democratic Organization of Cook County, 722 F.2d 1307, 1309-10 (7th Cir. 1983); and Rateree v. Rockett, 630 F.Supp. 763, 773 (N.D. Ill. 1986). The defendant carries the burden of proof on the issue of whether employees are policymaking or confidential. Elrod, 427 U.S. at 368, 96 S.Ct. at 2687, 49 L.Ed.2d at 562; Grossart v. Dianaso, 758 F.2d 1221, 1226 (7th Cir. 1985); and Nekolny v. Painter, 653 F.2d 1164, 1169 (7th Cir. 1981).

The purpose of the policymaking exception is to insure that the First Amendment's protection does not interfere with the workings of a democratic government and the ability of the duly elected officials to implement their policies. Elrod, 427 U.S. at 367, 96 S.Ct. at 2686, 49 L.Ed.2d at 562; and Shakman, 722 F.2d at 1310. But the ultimate inquiry

is not whether the employee is labeled "policymaking" or "confidential," rather whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved. Branti, 445 U.S. at 518, 100 S.Ct. at 1294, 63 L.Ed.2d at 584; Tomczak v. City of Chicago, 765 F.2d 633, 540 (7th Cir. 1985); and Delacruz v. Pruitt, 590 F.Supp. 1296, 1303 (N.D. Ind. 1984).[3/]

3/ Although the Seventh Circuit has continued to utilize the terms "policymaker" and "confidential" in determining whether political affiliation can be considered for certain positions, as in Nekolny, Soderbeck, and Tomczak, the policymaking exception is best viewed as a subset of the more inclusive exception announced in Branti. Grossart, 758 F.2d at 1227 n.4. See Meeks v. Grimes, 779 F.2d 417, 420 (7th Cir. 1985)) (while Branti establishes the central line of inquiry, it is erroneous to say that the policymaking and confidential categories no longer are useful); Patkus v. Sagamon-Cass Consortium, 769 F.2d 1251, 1259 n.3 (7th Cir. 19859); and McDonald v. Krajewski, 649 F.Supp. 370, 379 (N.D. Ind. 1986) (although Branti and Nekolny established the standards, the exception in Elrod remains quite useful). See also Branti, 445 U.S. at 518, 100 S.Ct.

The Seventh Circuit's reiteration of the Branti formulation has emphasized the function of the office involved and has determined that an employee's position is unprotected if there is room for principled disagreement in the decision reached by the employee and his superiors and the employee has meaningful direct or indirect input into the decisionmaking process. Bicanic v McDermott, 867 F.2d 391, 394 (7th Cir. 1989); Meeks v. Grimes, 779, F.2d 417, 420 (7th Cir. 1985); Tomczak, 765 F.2d at 641; Grossary, 758 F.2d at 1226; and Nekolny, 653 F.2d at 1170. The court must examine the powers inherent in the office and not the functions performed by the particular

---

3/ (Con.'t) at 1294 (not all those who make policy should forfeit their First Amendment rights: "The coach of a State university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats").

occupant. Bicanic, 867 F.2d at 394; Kurowski v. Krajewski, 848 F.2d 767, 770 (7th Cir. 1988); and Tomczak, 765 F.2d at 640-42. In determining the powers of the office, the court should consider:

> (1) the nature and number of responsibilities of the office; (2) whether responsibilities are not well defined or are of the broad scope; (3) whether the responsibilities including acting as an advisor for formulating or implementing policy and goals; (4) whether the position includes control of a budget and employees, and, if so, how much and how many, respectively; (5) whether the position calls for close work with high government officials, making personal loyalty an appropriate consideration; and (6) the salary level of the position, as compared to other positions within the governmental entity.
>
> Rodez v. Village of Maywood, 641 F.Supp. 331, 336 (N.D. Ill. 1986).

See also Elrod, 427 U.S. at 367-68, 96 S.Ct. at 2687, 49 L.Ed.2d at 562; Tomczak, 765 F.2d at 642; Shakman, 722 F.2d at 1309; and Nekolny, 653 F.2d at 1170.

In the instant case, the parties are at issue over both elements; whether the plaintiff was transferred for political

reasons and the confidentiality of the investigator position. Therefore, each issue must be analyzed. With respect to the first element, it is clear that Matlock's transfer was based upon his continued political support for Hatcher. Prior to the transfer, King acknowledged that Matlock was performing his duties properly:

> Q. So also prior to the time of the transfer of Mr. Matlock, are you aware of - what was your - what did you think of his job performance?
>
> A. I think Mr. Matlock performed reasonably well in the circumstances that we had. He had been at the job, you know, a long period of time, and we've had - we had a couple of staff meetings where we talked about kind of changing the direction of some things that we wanted out of our investigative reports. But I think that Mr. Matlock served reasonably well.
>
> Q. Other than things you talked about, what the Deputy Mayor had told you, the concerns you have expressed, was there anything about his job performance that was such that you would have either transferred him or terminated him from the force at the time you did, other than those matters you've expressed?
>
> A. No - well, yes, there is nothing other than that. Did you say something about terminate?

Q. Well, terminate or transfer; I used either one of those.

A. Okay. The transfer was based on basically the things I just enumerated and nothing else.

(King Deposition, pp. 41-42).

The decision to transfer Matlock was made after he had been seen with Hatcher at the April 30th dinner and after discussions between Ware, Comer, and King. Ware acknowledge her involvement in the decision:

Q. Who actually was involved in that decision that you know of?

A. Well, it was just - I think it was me and based upon information I had gotten from someone else.

Q. What information did you get from someone else?

A. I got information from the Deputy Mayor's office that he had escorted.

Q. Okay and that's Mr. Comer?

A. Yes.

(Ware Deposition, p. 17)

King also acknowledged his involvement in the transfer:

Q. Why was Jim Matlock transferred?

A. Basically, what had happened was that the Deputy Mayor had indicated that he had observed Mr. Matlock escorting the former mayor to some affair, to some function. I right off the bat was extremely concerned about that in terms of a confidentiality question.

(King Deposition, p. 36).

• • •

Q. Were there any discussions between you, other thanany confrontation you had with Jim Matlock, were there any discussions you had with anyone else, discussing this same concern you just talked about?

A. The Deputy Mayor, of course; I expressed my concern, and also Personnel Director, Beulah Ware talked about it.

Q. And basically was this in one meeting or a number of meetings?

A. I remember my conversation with the Deputy Mayor was after one of the cabinet meetings specifically, and the other conversation with Beulah or anyone else could have taken place within the next month or so at various times. And I don't remember a special meeting per se just to, you know, just to discuss that issue.

Q. With regard to the comment about Mr. Matlock excorting the former mayor, who brought that to your attention?

A. The Deputy Mayor, Mr. Comer.

(King Deposition, p. 38).

In their affidavits filed in support of the Motion for Summary Judgment, Comer, King, and Ware acknowledged that they lost confidence in Matlock's ability to function as a confidential investigator after he was seen with Hatcher. (Comer Affidavit, pp. 4-7; King Affidavit, pp. 12-16; Ware Affidavit, p. 4) Matlock has demonstrated that King, Ware, and Comer made the decision to transfer him for political reasons, and he is entitled to summary judgment on that issue.

The involvement of Barnes in the decision to transfer Matlock is not as clear. In the affidavit which he submitted in support of the defendants' Motion for Summary Judgment, Barnes stated:

> 7. I did not make the decision to transfer Mr. Matlock, or conspire with any person to do so.
>
> 8. On April 30, 1988 I observed Mr. Matlock escorting and acting as part of the personal entourage of the former Mayor, Richard Gordon Hatcher, at a political fund raising event in Indianapolis.

> 9. Observations on this occurrence added to my doubts regarding his trustworthiness and my lack of confidence in Mr. Matlock. The fact that there were several lawsuits in the Law Department involving the former Mayor and/or political appointees of the former Mayor, and the necessity to involve our attorneys and investigators in confidentially and/or politically sensitive matters on a routine basis raised concerns relative to Mr. Matlock.
>
> • • •
>
> 11. Under the circumstances, I believe that the transfer of the Plaintiff from the investigator position in the Law Department to the turnkey position in the City jail was reasonable and did not violate any clearly established, constitutional right of the Plaintiff. I had no reason to intervene in the decision to transfer Mr. Matlock.
>
> • • •
>
> 13. Since I have assumed the office of Mayor of the City of Gary, the City of Gary has not accepted, adopted, carried out and/or maintained a policy of transferring employees because of their political . . . . associations.

However, King has stated that he discussed the transfer with Barnes:

> Q. Other than the Deputy Mayor and the Director of Personnel, Miss Ware, were there any other people you discussed it with prior to the time of the transfer - in Jim Matlock - anybody else you discussed this with prior to the transfer.

A. I mentioned it to the Mayor.

Q. And what was his position on the matter?

A. He agreed with my assessment that that certainly raised a confidentiality question that - you know, that we were concerned about.

(King Deposition, pp. 40-41).

Under all of the circumstances, a factual dispute exists concerning Barnes' involvement in the transfer, and summary judgment is inappropriate on that issue.

With respect to the second element of a political firing claim, the defendants maintain that Matlock occupied a confidential position and that he could be discharged or transferred for political reasons. In his deposition, King was asked to describe the duties of an investigator.

Q. What was the job of an investigator? When you came in, what did you understand the job of investigator to be in the Law Department?

A. Basically, to investigate, starting from the initial process when a person filed a notice of claim against the City it was the job of the investigator to go out to try to obtain statements from the witnesses, from the persons involved, and write up a

recommendation: "This is something we ought to settle; this is something that there is no liability on the part of the City." In addition there were various other things, sundry kinds of things like serve subpoenas, deliver documents to court, other things that kind of fall through the cracks, to keep a law office running.

(King Deposition, p. 18)

King also justified the transfer of Matlock based upon the confidentiality of that position.

Q. Why was Jim Matlock transferred?

A. Basically, what had happened is that the Deputy Mayor had indicated that he had observed Mr. Matlock escorting the former mayor to some affair, to some function. I right off the bat was extremely concerned about that in terms of a confidentiality question. The previous Corporation Counsel had files locked up or locked the office up, and that kind of thing. I had pretty much an open door situation. If you worked in the Law Dept., you had access to any and all files and things that were in the Law Dept. When we took office in January, the former mayor had - there were no files left in his office; absolutely no files left. We had contemplated and decided to file an action to replevin those files. There were other cases that we considered to be sensitive cases that we were concerned about, particularly the case that was filed by the Gary Municipal Airport

Board that had been appointed by the former mayor.

In addition, I think Mr. Charles Deggins had filed an action, so there were cases up there that we considered to be sensitive, and as a result of that, I kind of - I lost confidence in Jim. He had full run of the office, as any employee did, and we didn't lock up files like the former Corporation Counsel and I lost confidence in him. So that basically was the reason for the transfer, and I expressed that to him when he and I talked about it.

(King Deposition, ppg. 36-38).

• • •

Q. Was there any consideration given as to other ways in which Mr. Matlock could continue as an investigator but yet satisfy your concerns?

A. Well I kind of looked at it as a situation if I'm asked particularly with the situation I just described previously about wanting to have some documents delivered that pertained to a case that involved the former mayor or the former administration, the question automatically popped in my mind if I don't have or if I didn't have somebody else available to deliver it, what would I do, and it amounted to having to compromise my running, you know, running of the office as I thought it should be run versus an individual who I had subsequently lost confidence in his ability - not his ability to perform the job, but because of his - the situation with the former mayor; that concerned me, and the fact that we had cases in our office pending on that very individual.

Q. Prior to the point you transferred Mr. Matlock, did you have any evidence that Mr. Matlock had compromised the confidentiality of any information in the Law Department?

A. No, no evidence of that. In fact, the date Mr. Matlock and I - I mean that he received the memo, he came in and we kind of discussed the reason for the transfer,and he indicated that he was aware of that being a potential problem, and that he had sought not to be involved, but in cases that may be sensitive like that. But I guess if we've got the open door policy and so forth, and anybody who is in that office can and do and we do call upon them to do things, to pull those files and do things, that it would have and could have I assume amounted to a position of him at some point as I just stop in and said, "Matlock, I want you to do something on this file," he will say, "I can't do that because I think there is a conflict," and of course, we never got to that kind of case, but you know -

(King Deposition, pp. 42-44)

As previously stated, in determining whether an employee occupied a confidential position, the court must examine "the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office." Tomczak, 765, F.2d at 640; and Bicanic, 867 F.2d at 394. In the instant case, it is

impossible to determine accurately the exact nature of the duties of the investigator for the Law Department. To begin with, Matlock did not attempt to explain the duties which he was performing in his Motion for Summary Judgment. Absent any guidance from Matlock, the testimony of King must be relied upon in determining the investigator's duties. However, the explanation of the duties given by Mr. King was not entirely consistent. Some of the duties explained by King were routine tasks such as serving subpoenas and obtaining witness statement. (King Deposition, p. 18). The only time the issue of confidentiality was raised related to cases involving Hatcher or a member of his administration. (King Deposition, p. 42).

Additionally, the defendants' argument concerning an anticipatory breach of confidence has been rejected by the Seventh Circuit. In Meeks, the newly elected city judge attempted to justify the discharge of the court bailiffs by stating that the

bailiffs held confidential positions which required trust and loyalty, including access to court files. In rejecting that argument, the Court of Appeals stated:

> Defendants stress that any access to court records when coupled with political animosity creates a serious threat of politically motivated breaches of the confidentiality of the judicial process. This argument, while relevant, proves too much. These bailiffs are duty-bound to protect the sanctity of the courts, and, while political affiliation may be an acceptable proxy for loyalty, trust, and maybe even efficiency, it would cast the net of the Elrod exception too wide to allow political support to be used to extrapolate a tendency to breach a sworn duty, behave unprofessionally, or commit criminal acts. 779 F.2d at 421.

In fact, King acknowledged that there was no evidence that Matlock ever had compromised the confidentiality of the Law Department. (King Deposition, p. 43).

It also should be noted that King and Barnes assumed office on January 1, 1988 and that Matlock continued to serve as an investigator for over four months prior to his discharge. From his first day in

office, King was aware of the duties of the investigator and the potential problems with the former mayor. The failure of King to remove Matlock immediately upon assuming office may suggest to a jury that King did not consider the position confidential until after a reason was needed to justify the transfer of Matlock.

Under all of the circumstances, the factual disputes concerning the duties of the investigator preclude the entry of summary judgment.

The defendants also have argued that Matlock participated in the decisionmaking process by settling claims made against the City. In support of their Motion for Summary Judgment, the defendants attached copies of four authorizations to settle property damage claims prepared by Matlock and approved by the corporation counsel and the mayor. (Motion for Summary Judgment, Exhibit H). These authorizations refer to cases in which individuals made claims

against the City for property damage to a vehicle, and Matlock made a recommendation to settle the claims after his investigation. Those routine or ministerial decisions do not come within the definition of a policymaker. In Bicanic, the Court of Appeals stated.

> The political officials must be able to count on the support of those who prepare budgets, negotiate and sign contracts, and generally run the show at a substantial component of the government. The Commission had the last formal word on some of these subjects, but members of the President's cabinet may be political appointees notwithstanding their formerly subordinate status on the organization chart of the executive branch; so to with responsible subordinates in the City of Hammond. 867 F.2d at 394.

It is clear that Matlock's input into the decisionmaking process was at an extremely low level and that his decisions on the settlement of accident claims had to be approved by both the corporation counsel and the mayor. Therefore, the defendants have failed to demonstrate that Matlock was a decisionmaker who could be removed for political reasons.

MUNCIPAL LIABILITY

Both Motions for Summary Judgment address the liability of the City of Gary. A municipality may not be held liable for the wrongful actions of its employees under the theory of respondeat superior. City of St. Louis v. Praprotnik, 485 U.S. 112, __, 108 S.Ct. 915, 923, 99 L.Ed.2d 107, 116 (1988); and Pembaur v. Cincinnatti, 475 U.S. 469, 478, 106 S.Ct. 1292, 1297, 89 L.Ed.2d 452 (1986). However, a municipality may be held liable for decisions made by high ranking officials. In Pembaur, the Supreme Court stated:

> (I)t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under 1983 for a single decision by its properly constituted legislative body - whether or not that body had taken similar action in the past or intended to do so in the future - because even a single decision by such a body unquestionably constitutes an act of official government policy. (citations omitted) But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level
>
> . . . .

> . . . If the decision to adopt that particular course of action is properly made by that government 's authorized decisionmakers, it surely represented an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. (footnote omitted)
>
> 475 U.S. at 480-481; 106 S.Ct. at 1298-99

In explaining which public officials act on behalf of the municipality for purposes of Section 1983, the Supreme Court concluded:

> Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official - even a policymaking official - has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. (citation omitted) The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be

> delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. . . . We hold that municipal liability under Section 1983 attaches where - and only where - deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. (footnotes omitted)
>
> 475 U.S. at 481-83; 106 S.Ct. at 1299-1300.

See also Praprotnik, 106 S. Ct. at 924; and Zook v. Brown, 865 F.2d 887, 895 (7th Cir. 1989).

At this state in the proceedings, it cannot be determined whether Barnes actively participated in the transfer of Matlock. However, it is clear that Barnes as mayor has "final policymaking authority" with respect to employees within his administration. Therefore, if Barnes transferred Matlock in retaliation for his political support of Hatcher, that conduct would be binding on the City of Gary. Matlock's Motion for Summary Judgment must be granted with respect to municipal

liability of the conduct of Barnes.

Since a public official may not be held liable under the theory of respondeat superior, the plaintiff must establish misconduct by Barnes himself before liability may be imposed against either the mayor or the City. In Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988), the Court of Appeals stated:

> To be held liable for conduct of their subordinates, supervisors must have been personally involved in that conduct. That is a vague standard. We can make it more precise by noting that supervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable, because negligence is no longer culpable under section 1983. Gross negligence is not enough either. The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference. (citations omitted)

856 F.2d at 992-93

Also in Cynar v. City of Chicago, 865 F.2d 827 (7th Cir. 1989), the plaintiff alleged

that his lateral transfer was based upon his political affiliations. In affirming the directed verdict in favor of Mayor Harold Washington, the Court of Appeals stated:

> Although the mayor may have indirectly (through Ware (the mayor's chief of staff)) approved the (plaintiff's supervisor's) transfer program, there is no doctrine of superior's liability in Sect. 1983 actions; instead, the official must actually have participated in the constitutional wrongdoing. (citations omitted) Here there is no evidence that Mayor Washington did. He may have failed to stop the transfer; but as we explained in Soderbeck v. Burnett County, 752 F.2d at 293:
>
> "Failure to take corrective action cannot in and of itself violate Sect. 1983. Otherwise the action of an inferior officer would automatically be attributed up the line to his highest superior and thence to the local government. This ladder of liability would be inconsistent with the distinction created by Monell (v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) between the direct and derivative liability of local government, and with the many lower-court cases that reject the notion that supervisors are strictly liable for their subordinates' violations of Sect. 1983.

865 F.2d at 847 (emphasis in original)

See also Praprotnik, 108 S.Ct. at 927 (mere failure to investigate the conduct of a subordinate would not establish municipal liability); and Volk v. Coler, 845 F.2d 1422, 1432 (7th Cir. 1988).

Since there is a factual dispute concerning the involvement of Barnes in the decision to transfer Matlock, no final decision can be made on the liability of the City. However, the plaintiff must establish direct involvement by Barnes in order to recover against both the mayor and the City.

QUALIFIED IMMUNITY

The defendants contend that the prohibition against transferring an investigator was not clearly established when the transfer occurred on May 23, 1988. Since the Supreme Court's 1976 decision in Elrod v. Burns, it has been clear that a public official may not discharge an employee because of his political beliefs. However, the scope of

qualified immunity cannot be determined based upon a general principle of law. In Green v. Carlson, 826 F.2d 647 (7th Cir. 1987), the Court of Appeals discussed the question of qualified immunity and stated:

> (I)n order to determine whether the law was clearly established at the time of the defendant's alleged violation, a court cannot look at the legal form at issue in the abstract. Rather, the test for qualified immunity is "whether the law was clear in relation to the specific facts confronting the public official when (he or she) acted." Collazzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987); see Anderson v. Creighton, __U.S.__, 107 S.Ct. 3034, 3039 & n.2 97 L.Ed.2d 523 (1987). 826 F.2d at 649.

See also Rakovich V. Wade, 850 F.2d 1180, 1209 (7th Cir. 1988).

Although the plaintiff must demonstrate that the law was clearly established at the time the public official made the decision, an appellate court decision on that issue is not required. In Cleveland-Perdue v. Brutsche, 881 F.2d 427 (7th Cir. 1989), the Court of Appeals stated:

> The presence of a controlling precedent is not, however, a sine qua non of a finding that a particular right has been clearly established within the meaning of Harlow (v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). (citation omitted) In the absence of a controlling precedent we look to all relevant caselaw in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful. To state the proposition in another way, we seek to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time. This approach makes eminent sense for it precludes an official from escaping liability for unlawful conduct due to the fortuity that a court in a particular jurisdiction had not yet had the opportunity to address the issue. 881 F.2d at 431.

See also Doe v. Bobbitt, 881 F.2d 510, 511 (7th Cir. 1989); and Rakovich, 850 F.2d at 1209.

In Elrod, one of the plaintiffs was a bailiff and security guard in the juvenile court and another was employed as a process server by the Sheriff's Department. In Meeks, the plaintiffs were bailiffs

responsible for courtroom security and process serving. And in McMillian v. Svetanoff, 793 F.2d 149 (7th Cir. 1986), the plaintiff was a court reporter. These decisions were made prior to the decision to transfer Matlock and contained extensive discussions concerning the confidentiality requirement as it relates to the operation of a legal staff. For purposes of trust and confidentiality, the concerns of a court do not differ significantly from the concerns of a city's legal department or even a private law firm.[4/] As previously stated, factual disputes exist

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4/ The defendants city Cygnar for the proposition that a lateral transfer, as opposed to a discharge, cannot support a First Amendment violation. Since Cygnar involved a transfer without a reduction in pay, it is not controlling. If the jury accepts Matlock's claims of retaliation, a violation of the First Amendment has occurred. See generally Rutan v. Republican Party of Illinois, 868 F.2d 943, 954 n.4 (7th Cir. 989); and Hart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982).

concerning the exact nature of Matlock's duties as an investigator. The issue of qualified immunity does not change the general rule on a motion for summary judgment. Wrigley v. Greanias, 842 F.2d 955, 958 (7th Cir. 1988); and Harris v. Davis, 874 F.2d 461, 466 n.1 (7th Cir. 1989) (Ripple dissenting). But compare Polenz v. Parrott, 883 F.2d 554, 555 (7th Cir. 1989). As in any case involving a factual dispute, the actual duties of the investigator position must be resolved by the jury. Accordingly, special interrogatories will be submitted to the jury concerning the duties of the investigator. After the jury resolves any factual disputes, this Court will determine whether the defendants' conduct violated a clearly established law at the time the decision was made. See generally Jones, 856, F.2d at 994-95; and Rakovich, 859 F.2d

at 1201-02. Therefore, summary judgment is inappropriate.

For the foregoing reasons, the Motion for Summary Judgment filed by the plaintiff on October 6, 1989, is **GRANTED IN PART:**

a. The decision of the defendants, Richard Comer, Gilbert King, Jr., and Beulah Ware, to transfer the plaintiff was politically motivated; and

b. The defendant, the City of Gary, is liable for any decisions made by the defendant, Thomas V. Barnes, as mayor.

In all other respects, the Motion for Summary Judgment is DENIED. The Motion to Dismiss and/or for Summary Judgment filed by the defendants on October 11, 1989 also is DENIED.

ENTERED this 23rd day of October, 1989.

/s/
ANDREW P. RODOVICH
United States Magistrate

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CASE NO. H88-673

JAMES C. MATLOCK

Plaintiff

v.

THOMAS BARNES, Individually, and in his capacity as the Mayor of the City of Gary; RICHARD COMER, Individually, and in his Capacity as the Deputy Mayor of the City of Gary; GILBERT KING, JR., Individually, and as City Attorney of the City of Gary; BEULAH WARE, Individually, and as Director of the Personnel Department for the City of Gary; and THE CITY OF GARY, an Indiana Municipal Corporation,

Defendants

MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Comes now Defendants, Thomas V. Barnes, Mayor, Richard Comer, Deputy Mayor, Gilbert King, Jr., Corporation Counsel, and Beulah Ware, Personnel Director, individually and in their official capacities and the City of Gary, by City Attorney, Macarthur Drake,

pursuant to Rule 12(b)(6), and/or Rule 56 of the Federal Rules of Civil Procedure and request this Court to dismiss this cause of action and/or grant Defendants' Motion for Summary Judgment, and in support of said motions state as follows:

1. That the Plaintiff has failed to state a claim against Defendants upon which relief can be granted:

A. Plaintiff has failed to allege operative facts to support a violation of a constitutional right.

B. Plaintiff has failed to allege particularized facts which give rise to a conspiracy cognizable under federal law.

C. Plaintiff has failed to allege facts that support injunctive relief.

D. Plaintiff has failed to allege facts sufficient to entitle him to relief under the Fourteenth Amendment to the U.S. Constitution.

E. Defendants Barnes, Comer, King, and Ware are entitled to qualified immunity as to Plaintiff's claim for damages.

2. That there are no genuine issues of material fact in dispute and the Defendants are entitled to summary judgment as a matter of law on the following claims:

A. Plaintiff's Fourteenth Amendment claim

(1) Plaintiff has no property interest in his position.

(2) Plaintiff is a employee at will.

B. Plaintiff's First Amendment:

(1) Union activity claim

(2) Harassment claim

(3) Political association claim

3. Defendants request the Court to consider Plaintiff's answers to Defendants' First Interrogatories (Exhibit A), and excerpts from deposition testimony attached hereto and incorporated as fully set forth. (Exhibits B thru G and I thru J)

4. In addition to the pleadings and the discovery taken, in support of their Motion for Summary Judgment, the Defendants submit the Affidavits of Mayor Thomas V. Barnes, Deputy Mayor Richard Comer, and Corporation Counsel, Gilbert King, Jr., and Personnel Director Beulah Ware, which are attached hereto, and incorporated as fully set forth. (Exhibits K, L, M, N, respectively)

WHEREFORE, Defendants request the Court to dismiss this matter and/or grant their Motion for Summary Judgment on all the issues raised by these motions, attorney fees, costs of this action and for all other just and proper relief.

Respectfully submitted,

/s/ MACARTHUR DRAKE
CITY ATTORNEY
ATTORNEY FOR DEFENDANTS
401 BROADWAY
GARY, IN 46402
(219) 881-1400

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CASE NO. H88-673

JAMES C. MATLOCK

Plaintiff

v.

THOMAS BARNES, Individually, and in his capacity as the Mayor of the City of Gary; RICHARD COMER, Individually, and in his Capacity as the Deputy Mayor of the City of Gary; GILBERT KING, JR., Individually, and as City Attorney of the City of Gary; BEULAH WARE, Individually, and as Director of the Personnel Department for the City of Gary; and THE CITY OF GARY, an Indiana Municipal Corporation,

Defendants

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
AND/OR FOR SUMMARY JUDGMENT

MOTION TO DISMISS

INTRODUCTION

Plaintiff, in his Second Amended Complaint (hereinafter "Complaint"), claims that the Defendants violated his rights under the First and Fourteenth Amendments to

the U.S. Constitution and 42 U.S.C. 1983. The Plaintiff sued the Defendants individually and in their official capacities alleging primarily that they conspired to transfer, and did transfer, him from his employment in the Law Department as a Legal Investigator to a Turnkey at the Gary City Jail at reduced pay because of his exercise of his First Amendment right to free speech, political association and union activity. He further alleged that since the transfer, he has been subjected to continuing harassment by the Defendants. He seeks the Court to issue a declaratory judgment, a preliminary injunction, a permanent injunction, and requests compensatory damages and attorneys fees and costs of this action.

Defendants contend that the Plaintiff's Complaint is fatally deficient in that the

Plaintiff has not alleged sufficient operative facts that outline a constitutional violation. There are insifficient operative facts to support a violation of Plaintiff's First Amendment rights because of political association, personal association, union activity or a conspiracy to harass the Plaintiff. Additionally, the Complaint is completely void of any opeative facts which support a violation of Plaintiff's Fourteenth Amendment rights.

Moreover, the Defendants, Barnes, Comer, King and Ware contend that acts complained of by the Plaintiff were reasonable and with the good faith belief that they did not violate clearly established law in May of 1988. Therefore, the Defendants, Barnes, Comer, King, and Ware are qualifiedly immune from damages in this action.

The Plaintiff held a confidential position in which political considerations may be a legitimate job criteria. Additionally, the Defendants lost confidence and trust in the Plaintiff after he was seen escorting the former Mayor, Richard G. Hatcher at a political dinner (Jefferson-Jackson Dinner) in Indianapolis, Indiana on April 30, 1988. They felt that the policies and confidences of the new adminstration had the potential of being compromised by the Plaintiff's continued personal and political association with Richard Gordon Hatcher, the former Mayor of Gary. Barnes' victory was viewed as a signal that the voting public wanted a change in government. Plaintiff was perceived as the alter-ego of the former administration because of his continued close association with the former Mayor Hatcher.

Further, Defendants claim that the Plaintiff was a employee at will and could be transferred for any reason as long as it was not a reason protected by the United States Constitution.

FAILURE TO STATE A CLAIM IN SECOND AMENDED COMPLAINT

Defendants reiterate and contend that in civil rights cases the law in the Seventh Circuit requires that the plaintiff plead operative factual allegations that outline a constitutional violation. See Rogers v. Lincoln Towing Services, Inc., 771 F.2d 194, 198. Not only is this law of this circuit but nearly every circuit that has considered this issue.[1]

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[1] See Hurney v. Carver, 602 F.2d 993, 995 (1st Cir. 1979) (courts need not "conjure up" unpled facts to support conclusory allegations); Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979) (civil rights complaint must do more than state simple conclusions); Hall v. Pennsylvania State Police, 570 F.2d 86, 89 (3d Cir. 1978) (complaint must be

Plaintiff alleges in Rhetorical Paragraph 19 of his Complaint that: "Defendants individually and in their official capacities conspired to transfer, and did transfer, Plaintiff from his employment in the Law Department to the Turnkey position in the City Jail at reduced pay because of the exercise of First Amendment rights of speech and political association." The Plaintiff does not specify a federal civil rights conspiracy under 42 U.S.C. 1985, which would be defective because the Plaintiff would have

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Footnote 1 cont'd: sufficiently precise to give notice of claims asserted); Smith v. International Longshoremen's Ass'n, 592 F.2d 225, 226 (4th Cir. 1979) (Federal Rules of Civil Procedure, Rules 8(a) and (e), require definiteness in complaint); Wetherington v. Phillips, 526 F.2d 591 (4th Cir. 1975), aff'g mem., 380 F.Supp. 426, 428 (E.D.N.C. 1974) (failure to allege facts showing constitutional deprivation leads to dismissal); Jewell v. Covington, Ga., 425 F.2d 459, 460 (5th Cir.) (general conclusory allegations unsupported by any facts do not

to allege "some facts that demonstrate that his race was the reason for Defendants (transfer) "Jafree v. Barber, 689 F.2d 640, 643 (7th Cir. 1982), nor does he specify whether he is alleging a state law conspiracy, which would not be actionable in Federal Court unless the Plaintiff requested the Court to take pendent jurisdiction of that issue. This is the third complaint filed in this matter and Plaintiff still fails to allege any facts to support his contention.

Footnote 1 cont'd: constitute cause of action), cert. denied, 400 U.S. 929, 91 S.Ct. 195, 27 L.Ed.2d 189 (1970); Place v. Shepherd, 446 F.2d 1239, 1244 (6th Cir. 1971) (pleading is not sufficient to state cause of action under Civil Rights Act "if its allegations are but conclusions"); Cohen v. Illinois Inst. of Technology, 581 F.2d 658, 663 (7th Cir. 1978) (some particularized facts demonstrating a constitutional deprivation are needed to sustain cause of action under Civil Rights Act), cert. denied, 439 U.S. 1135, 99 S.Ct. 1058, 59 L.Ed.2d 97 (1979); Nickens v. White, 536 F.2d 802, 803 (8th Cir. 1976) (civil rights pleadings must not be

In Plaintiff's deposition on September 28, 1989, he had no specific facts supporting the alleged "conspiracy and/or an unconstitutional motive of the Defendants." (See Memo Exh. 5).

In Hobson v. Wilson, 737 F.2d 1, 30-31 (DC Cir. 1984) cert. denied, 470 US 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985) the Court stated:

> Plaintiffs who fail to allege any .. specific facts to support a claim of unconstitutional motive cannot expect to involve government actors in protracted discovery and trial.

Accordingly, Plaintiff's claim of "conspiracy" without any specific facts as

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Footnote 1 cont'd: conclusory); Uston v. Airport Casino, Inc., 564 F.2d 1216, 1217 (9th Cir. 1977) (complaint must contain specific factual allegations to support claim of conspiracy); Coopersmith v. Supreme Court, 465 F.2d 993, 994 (10th Cir. 1972) (under federal rules, complaint must state factual basis for claim asserted).

to what any of the Defendants did or failed to do should be dismissed.

Under Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Court stated that: "The Doctrine of respondent superior does not apply to Section 1983 claims." However, a plaintiff may establish municipal liability for deprivation of constitutional rights if he can show the existence of a policy or custom, but the municipality may not be held liable under Section 1983 for every constitutional violation caused by its policies or customs.

It is true that a single act of the highest ranking official can constitute official policy or custom under certain circumstances. Pembaur v. City of Cincinnati, ___ U.S. ___, 106 S.Ct. 1292, 1298. However, not every decision by

municipal officers automatically subjects the municipality to Section 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. There are no facts or evidence to show that anyone with final decisionmaking authority did anything in this case. In order to be liable under 42 U.S.C. 1983, you have to do something which causes or subjects an individual to a deprivation of federal rights.

Further, Plaintiff's Complaint fails to state a claim for preliminary or permanent injunctive relief. In order to be entitled to injunction, relief, plaintiff must show four factors: (1) the threat of irreparable harm for which there is no adequate remedy of law; (2) that the threatened injury to plaintiff outweighs the harm an injunction might inflict on the defendnat; (3) that the

plaintiff has a reasonable likelihood of success on the merits, and; (4) that the issuance of a preliminary injunction would not deserve the public interest. American Can Co. v. Mansukhani, 742 F.2d 314, 325 (1984).

In A.O. Smith, Corp. v. FTC, 530 F.2d, 515 (3rd Cir. 1976) the court said "to constitute irreparable harm the threatened injury must be in some way peculiar." The court further stated: ". . . . . that only harm that the District Court cannot remedy following a final determination on the merits may constitute irreparable harm." In this case, the Plaintiff has failed to claim that type of harm which the Court could not remedy following a final determiantion on the merits. In fact, Plaintiff's claimed entitlement to back pay and reinstatement, remedies well within the Court's capabilities should Plaintiff succeed on the

merits, underscores his failure to plead a case for a preliminary injunction, considering factor (1), above, in Mansukhani, supra.

Nowhere in Plaintiff's Second Amended Complaint does he allege, in substances or otherwise, factors (2), (3) or (4), as set out above in Mansukhani, supra.

QUALIFIED IMMUNITY

In Harlow vs. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the U.S. Supreme Court held:

> That government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 457 U.S. at 818, 102 S.Ct. at 2738.

The entitlement (qualified immunity) is an immunity from suit rather than a mere defense to liability; and like an absolute

immunity, is an effectively lost if a case is erroneously permitted to go to trial. The Harlow objective formulation of the qualified immunity test applied to all public officials. See Anderson v. Creighton, ___ U.S. ___ 107 S.Ct. 3034, at 3042, 97 L.Ed.2d 523 (1987). "Harlow clearly expressed that the general principle of qualified immunity, if established, would be applied "across the board." Thus the doctrine of qualified immunity would include Defendants Barnes, Comer, King and Ware.

In Anderson, supra, the Court set out the specificity required in defining the "clearly established right" in a qualified immunity context as follows:

> Our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized and hence more relevent sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is

> doing violates the right. This is not to say that an official action is protected by a qualified immunity unless the previous right has been held unlawful, but it is to say that in light of the pre-existing law the unlawfulness must be apparent.

Anderson, supra, 107 S.Ct. at 3039.

The appropriate inquiry in this case is whether in May of 1988 there was a clearly established constitutional right that prohibited the City officials from transferring the Legal Investigator from the City Law Department because he was not a "confidential employee" for whom political considerations were appropriate requirements for effective job performance.

Once the Defendants' actions are defined and characterized according to the specific facts of the case, this characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specified defined action

violated clearly established law. See Zook v. Brown, 748 F.2d 1161 (7th Cir. 1984) (The test "focuses on the state of the law at the time of the alleged violation.")

In order to be clearly established, a question must be decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court. Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980) cert. denied, 451 U.S. 969, 101 S.Ct. 2045, 68 L.Ed.2d 348 (1981). See also Colazzi v. Walker, 812 F.2d 304 (7th Cir. 1987) (deals only with Seventh Circuit decisions in deciding if issue is well settled) quoted in Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988).

However, we hasten to urge that the Plaintiff, James Matlock, bears the burden of demonstrating the existence of "clearly

established" constitutional rights. Davis v. Scherer, 468 U.S. 183, 197, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139; Defendants contend that the Plaintiff cannot meet this burden.

In Delong v. U.S., 621 F.2d 618 (4th Cir. 1980), an action was brought by a public employee challenging his reassignment and transfer for political reasons. The Court, after recognizing the principles established in Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) namely, a non-policymaking, nonconfidential government employee can (not) be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs, went on to state:

> We believe that when the principle is applied to patronage practices other than dismissal, it is rightly confined to those that can be determined to be the substantial equivalent of dismissal." pg. 624.

The Seventh Circuit adopted the Delong analysis in Rutan v. Republican Party of Illinois, 868 F.2d 943, 951 (7th Cir. 1989), a case challenging a public employer's use of political considerations in . . . trans- ferring employees. In that case, quoting from Delong, the Court indicated:

> The "substantial equivalent to a dismissal" standard focuses on the same question presented in constructive discharge cases, that is whether a particular patronage decision would lead a reasonable person in the plaintiff's position to feel compelled to leave his job. Patterson v. Portch, 853 F.2d 1399, 1405-07 (7th Cir. 1988).

A constructive discharge is where the employer makes life so unbearable for the employee that the employee resignes. See Patterson v. Portch, 853 F.2d 1399, (7th Cir. 1988). It is noteworthy that the Plaintiff has not resigned and has continued to work in the Turnkey position since the

transfer in May of 1988. Moreover, Plaintiff has not looked for other employment. See Exh. C.

In light of case law as of May 1988, there is no clearly established constitutional right that prohibits the defendants from transferring the Plaintiff based on political consideration. See Cygnar v. City of Chicago, 865 F.2d 827 (7th Cir. 1989) p. 846, note 20.

> Further, we agree with the district court that in 1984 (or even now, January 4, 1989, date of decision) it was not clearly established that the transferred (Law Dept. Legal Investigator, who occasionally investigated matters not related to the Law Dept. was not a "confidential employee") for whom party affiliation is an appropriate requirement for effective performance of the office."

Therefore, Defendants Barnes, Comer, King and Ware are entitled to qualified immunity in this case.

PLAINTIFF'S FOURTEENTH AMENDMENT CLAIM

The Complaint in this action also claims that the Defendants have violated the Plaintiff's Fourteenth Amendment rights. Yet, the Complaint is completely devoid of any factual allegations of how Plaintiff's Fourteenth Amendment rights were violated.

The Fourteenth Amendment, in part, provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Defendants herein contend that Plaintiff had no Fourteenth Amendment property interest which was entitled to the protection of the due process clause to the United States Constitution.

To determine whether a property interest exists, this Court must look to state law:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to these benefits. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972).

An examination of Indiana law indicates that the Plaintiff had no legitimate claim of entitlement" to continued employment as a Legal Investigator for the Law Department/ City of Gary, and therefore, had no protected property interest.

Under Indiana law, if the tenure of service cannot be determined from the terms of the contract, such contract is one at will and may be terminated at any time at the election of either party. Pepsi-Cola General Bottlers v. Eli Lilly and Company, 413 N.E.2d 1054 (Ind. App. 1980). If a contract can be terminated, then Plaintiff certainly can be transferred.

It is equally well settled that under Indiana law an at-will government employee possesses no property interest in his

continued employment. Indiana Alcoholic Beverage Commission v. Gavit, 405 N.E.2d 585, 589 (Ind. 1980). Streckfus v. Ardenside Terrace Co-op, Inc., 504 N.E.2d 273 (Ind. 1987); Morgan Drive Away, Inc. v. Brant, 489 N.E.2d 933 (Ind. 1986). In the absence of a protected property interest, an employee does not have a right to procedural due process. Illinois Psychological Association v. Falk, 818 F.2d 1337 (7th Cir. 1987); and Gavit, 405 N.E.2d at 589. Matlock has failed to establish a "legitimate claim of entitlement: under Indiana law to his position as a Legal Investigator. Absent a "legitimate claim of entitlement", Matlock does not possess the requisite protected property interest to trigger the due process requirements of the Fourteenth Amendment.

The only discernible difference between Plaintiff's Second Amended Complaint and Amended Complaint is in the caption and Rhetorical Paragraph Five, which names Deputy Mayor Comer individually and in his official capacity.

Accordingly, Defendants reiterate and herein incorporate by reference its Memorandum filed July 13, 1989 in support of its Motion to Dismiss the Amended Complaint.

Plaintiff's Second Amended Complaint should be dismissed as to all Defendants for the reason that the Plaintiff has failed to state a claim for which relief can be granted.

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

STATEMENT IN COMPLIANCE WITH RULE 11 OF
THE U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

The Defendants contend that the uncontroverted material facts for the purpose of Defendants' Motion for Summary Judgment are as follows:

The Plaintiff, James C. Matlock, was employed as a Legal Investigator in the Law Department of the City of Gary from January, 1971 through May 30, 1988. (Pltf.'s Complt., para 8). On approximately May 23, 1988, the Defendant, Beulah Ware, Director of the Personnel Department of the City of Gary, notified Matlock that he would be transferred to the Gary City Jail as a Warden, that his salary would be reduced as a result of the transfer, and that the position he would be assuming would be as a Correctional Officer. (Pltf.'s Complt., para 14). In May of 1988, there was no political campaign in which the Plaintiff

supported a political candidate opposed by Mayor Barnes. Memo Exh. D.

Matlock actively supported the incumbent Mayor, Richard Gordon Hatcher, in the May 1987 Democratic mayoral primary against the Defendant, Thomas Barnes. Barnes defeated Hatcher by winning the General Election, and took office as Mayor of the City of Gary on January 1, 1988. (Pltf.'s Complt., para 14).

Mr. Matlock was transferred from his position of Law Department Investigator to the position of Corrections Officer at the Gary City Jail because he was in a confidential, sensitive position and the Corporation Counsel lost confidence in Mr. Matlock as a result of Mr. Matlock escorting former Mayor Richard G. Hatcher in May of 1988 to a function. (King's Aff.) In addition, Defendant King had instituted a new office procedure in which files were not locked up and all employees had access to

the files and materials contained therein in these sensitive files in the Law Department. (Memo Exh. E), (King's Aff.)

When Mayor Thomas V. Barnes took office, there were no files in the Mayor's office. There was an action in replevin filed entitled Ex Rel Thomas V. Barnes, Mayor City of Gary v. Richard G. Hatcher, Cause No. 45-D03-88-03-CP-00352, to recover those files. (Barnes' Aff.) Also, there were two cases pending in the U.S. District Court in which: (1) the former members of the Gary Municipal Airport Authority Board (Hatcher appointees) sued Mayor Barnes and the City of Gary for their removal as members of that Board; and (2) a case filed by Charles Deggans in March of 1988 in which the Affirmative Action Officer, under the Hatcher administration, sued Mayor Barnes and the City of Gary. (King's Aff.)

Further, department heads, the Mayor, and the Common Council routinely requested opinions from the Corporation Counsel and his staff relative to the operation of city government on politically sensitive matters. (King's Aff.)

The Law Department was composed of the Corporation Counsel and three (3) attorneys at the time Gilbert King, Jr. took over running the Department. There were two (2) secretaries, (1) one receptionist and two (2) legal investigators. (King's Aff.)

Although each employee had a specific job title, they often times worked in conjunction with each other on the same cases; therefore, an inter-working relationship was necessary for the effective operation of the Law Department. (King's Aff.) Mayor Barnes and Deputy Mayor Comer observed Mr. Matlock escorting the former

Mayor, Richard Gordon Hatcher, at a Jefferson/Davis Democratic political rally on April 30, 1988. As a result, they lost confidence in Mr. Matlock's ability to serve in a sensitive and confidential position in the Law Department. (Barnes' Aff.), (Comer's Aff.)

ARGUMENT

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. This Court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Further, "(a)ll factual inferences are to be taken against the moving party and in favor of the opposing party." Shlay v. Montgomery, 802 F.2d 918, 920 (7th Cir. 1986), quoting International Administrators, Inc. v. Life Insurance Co. of North America, 753 F.2d 1373, 1378 (7th Cir. 1985).

However, pursuant to Rule 56(c) once a motion for summary judgment has been made, with proper support, the burden then shifts to the opponent who must set forth specific facts to establish that there is an issue of material fact for trial. Shlay, 802 F.2d at 920.

To create a question of fact, an adverse party responding to a properly made and supported summary judgment motion must set forth specific facts showing that there is a genuine issue for trial . . . A party may not rest on mere allegations or denials of his pleadings; similarly, a bare contention

that an issue of fact exists is insufficient to raise a factual issue. Posey v. Skyline Corp., 702 F. 2d 102, 105 (7th Cir. 1983), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983). The disputed fact must be material, that is, it must be outcome-determinative. Egger v. Phillips, 710 F. 2d 292, 296 (7th Cir. 1983) (en banc), cert. denied, 464 U.S. 918, 104 S.Ct. 284, 78 L.Ed2d 262 (1983).

PLAINTIFF'S FOURTEENTH AMENDMENT CLAIM

For all the reasons previously stated and the case law presented on this issue in Defendants' Memorandum in Support of its Motion to Dismiss, the Defendants are entitled to summary judgment as a mater of law in that the Plaintiff has not pleaded any facts to support his Fourteenth Amendment Claim.

PLAINTIFF'S FIRST AMENDMENT CLAIMS

UNION ACTIVITY

There are absolutely no facts to support Plaintiff's contention that his transfer was based upon his union activities. See Memo Exh. I. In fact, the Personnel Director who authorized the transfer did not indicate Plaintiff was involved in the union until after he had been transferred from the Law Department. (Ware Aff.) Since there are no facts to support Plaintiff's contention that he was transferred because of his union activities, Plaintiff's First amendment rights in that regard can hardly be said to have been violated. Therefore, there is no genuine issue of material fact on the union activity issue and Defendants are entitled to Summary judgment as a matter of law.

HARRASSMENT

Plaintiff, in Rhetorical Paragraph 20 of his Complaint alleges: "As a further result

of the retaliatory transfer, plaintiff has been subjected to continuing harassment by the defendants." When asked to cite specific instances of harassment by the Defendants, the Plaintiff stated in answers to interrogatories as follows:

> (1) Transferred from investigator in Law Department to turnkey in City jail.
>
> (2) January 17, 1989 - attempt was made to deny Plaintiff nine (9) hours pay or compensation time for following a directive to report at 7:15 a.m. and not return until 4:15 p.m. to attend correctional job training program.

See Memo Exh. A.

But in Plaintiff's deposition of 9/28/89, he was asked what did each Defendant do to harass him. The Plaintiff did not have any facts to support that allegation. See Memo Exh. F.

Defendants contend that the incidents relied upon by Plaintiff as harassment are

at most ordinary personnel matters that may face any employee not unduly sensitive. In Pieczynski v. Duffy, 875 F.2d 1331 (7th Cir. 1989) at 1334, the Court commented on political harassment as follows:

> Harassment is exceedingly difficult to distinguish in practice from the normal friction between supervisory and subordinate employees; as a result, the existence of a constitutional tort of political harassment places public employers at the mercy of the vagaries of juries. Employees may try to buy themselves immunity from discipline by staking out a political position opposed to that of their employer, then ascribing to political persecution every act of discipline, every adverse change in working conditions, every failure of consideration by a superior, and finally bringing a suit for compensatory damages based on vague emotional malaise.

However, harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or

expressing those beliefs. See Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982); Pieczynski, supra, p. 1333. The alleged harassment in this case has no factual basis as indicated by Plaintiff. The alleged incidents are trivial and cannot fairly be represented as a pattern or campaign of harassment. See Bart, supra, p. 625.

Moreover, it is clear from Plaintiff's testimony that he was, and still is, not deterred from expressing his political beliefs. See Exh. G. Defendants are entitled to judgment on this issue as a matter of law since there is no genuine issue of material fact.

POLITICAL ASSOCIATION

"Claims of politically motivated personnel action in public employment abound in this circuit" Preczynski v. Duffy, 875 F.2d 1331, 1334 (7th Cir. 1989). A short chronological review of political patronage

cases might be helpful in evaluating Plaintiff's claim in this matter.

In Elrod, supra, the Court was presented with the question whether public employees who allege that they have been discharged or threatened with discharge solely because of their partisan political affiliation or non-affiliation state a claim for deprivation of constitutional rights secured under the First and Fourteenth Amendments. The Court held: "Non-policymaking, non-confidential government employees can (not) be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." 427 at 375, 96 S.Ct. at 2690.

In Branti v. Finkel, 445 U.S. 507, 63 L.Ed 2d 574, 100 S.Ct. 1289 (1980), the U.S. Supreme Court, in a patronage dismissal case, abandoned the labels of "policymaker"

or "confidential" fits the particular public office in question, but rather, whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office. 445 U.S. at 518, 100 S.Ct. at 1294.

In a case, literally down the street from the Gary Law Department, entitled Meeks v. Grimes, 779 F.2d 417 (7th Cir. 1985), the Seventh Circuit indicated: "our focus is on the "inherent powers" of the office, not what any individual office holder actually does." Meeks, supra, pg. 419 footnote 1; Tomczak v. City of Chicago, 765 F.2d 653, 641 (7th Cir. 1985).

However, in Meeks, supra, p. 423. the Court cautioned:

"We must stress the limited nature of the scope of this opinion. First, it applies to a select number of government employees; only those employees who work in direct and

constant contact with a political-employer would be exempt from the First Amendment's protection against patronage dismissals." For example, we would be talking about those employees who worked directly with the elected official-Mayor Barnes. This, of course, is not the situation in this matter. Secondly, this opinion merely provides a basis for a problem this Court has faced before and resolved in favor of allowing discharge . . . All that is involved here is a recognition of a legally cognizable distinction between "bureaucratic" employees and those government workers employed in less structured settings.

The possibility of "leaks" with access to sensitive information is a constant threat to any unit of government." Meeks, supra, p. 420. The term confidential employee is a catchall phrase that encompasses those governmental employees

who, while not decisionmakers, are in close contact with policymakers and the highly confidential communications or records affecting decisions . . . The basis for exempting this type of employee is that political antipathy can serve as a decent proxy for a lack of trust where the employee's responsibilities include a duty to shield the decisionmaking process from the outside world. It is clear that the Corporation Counsel, Gilbert King, Jr., occupies a policymaking position within the Gary city government. He was appointed and serves at the pleasure of the Mayor. He is the chief legal officer for the City of Gary.

Mr. Matlock had constant daily contact with the Corporation Counsel and routinely assisted Mr. King in making decisions. (See Exh. H, and King's Aff.)

Some of the Corporation Counsel's duties are as follows:

1. Drafting ordinances, leases, deeds, contracts or other legal papers for the City in its various departments;

2. Appearing for and protecting the rights and interests of the City in all actions and proceedings brought by or against it or against any officer or head of any City board or department in his official capacity;

3. When requested by the Mayor, the Common Council, or the head of any department, furnishing opinions upon law subjects connected with the City;

4. Conducting all legal proceedings and appeals of every nature authorized by law;

5. Making and effecting settlements of law suits and claims for and against the City as he may deem in the best interests of the City, subject to the approval of the Mayor.

The office of the Corporation Counsel is functionally the same as a private law firm. In that situation, the canons of ethics require confidentiality of client's records and business. This confidentiality extends from the senior partner to the janitor.

Mr. Matlock had access to highly confidential communications and records affecting decisions in his positon as a Legal Investigator and any leak of sensitive

information would be a threat to the integrity of city government.

The Plaintiff, Mr. Matlock, was a staunch supporter of the former mayor, Richard G. Hatcher (Pltfs.' Complt., para. 14). Mr. Matlock was asked several questions as to whether his close association with Mr. Hatcher would affect ability to investigate a case within the Law Department concerning Hatcher. His response was "I don't know, but I doubt it," (Memo Exh.) This hedging response only tells part of the story. We must believe what we see rather than what we hear. In this case, Plaintiff continued his close relationship and association as evidenced by him escorting Mr. Hatcher April 30, 1988, in Indianapolis, at the Jefferson-Jackson dinner, a political affair, some four months after the new administration had taken office.

Due to the fact that there was litigation in the Law Department wherein Mr. Hatcher had been sued in a lawsuit to recover the files and other items missing from the Mayor's office when Mayor Barnes took office, the Barnes administration lost confidence and trust in Plaintiff.

For the City to retain Mr. Matlock, the Barnes administration would have had a political enemy as the Legal investigator in the Law Department. This situation is appropriately summarized below by a quote from Soderbeck v. Burnett County Wisconsin, 752 F.2d 285-288 (7th Cir. 1985):

> **You cannot run a government with officials who are forced to keep political enemies**
>
> . . .

A confidential employee may constitutionally be discharged (transferred) soley upon the basis of political affiliation when he stands in a confidential relationship to

a policymaker or the policymaking process . . . Stegmacer v. Trammell, 597 F.2d 1027, 1040 (5th Cir. 1979).

> Those the people elect are entitled to employ others who hold their confidence; they must do so if they are to carry out the programs they promise to pursue. (Matlock wanted both to be privileged to confidential and sensitive matters of government and be insulated from politics . . .)

Bicanic v. McDermott, 867 F.2d 391, 395 (7th Cir. 1989)

There is no genuine issue of material fact as to the political association claim and the Defendants are entitled to a summary judgment as a matter of law.

Respectfully submitted,

/s/

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(CERTIFICATE OF SERVICE ATTACHED)

Supreme Court, U.S.
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No. 91-320

In The

Supreme Court of the United States

October Term, 1991

THOMAS V. BARNES, et al.,

Petitioners,

v.

JAMES C. MATLOCK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF THE CASE

James Matlock filed a complaint in the Northern District Court of Indiana alleging that the City of Gary, Mayor Thomas v. Barnes, Deputy Mayor Richard Comer, Personnel Director Beulah Ware, and Corporation Counsel Gilbert King, improperly demoted him from his position of legal investigator in the Gary City Law Department to the position of jail turnkey in the Gary City Jail, in retaliation for his political support of candidates opposed by Barnes and his administration, and for Matlock's continuing support of former Mayor Richard Hatcher who Barnes had defeated in a bitter political primary election, and in violation of his First and Fourteenth Amendment Rights to the United States Constitution and 42 U.S.C. 1983. The case was tried against all defendants in their official and individual capacities. Prior to trial the District court had granted partial summary judgment in favor of Matlock finding that there was no dispute of material fact that the decision of Comer, King and Ware to demote Matlock was politically motivated. All other factual issues such as the duties of a legal investigator for the Gary City Law Department, the participation of defendant Barnes and the liability of the City of Gary for the transfer of Matlock were submitted to a jury, and following a five day trial, the jury returned a verdict in favor of Matlock on all issues. Prior to the entry of the judgment on the verdict, Matlock moved to voluntarily dismiss the defendant officials in their individual capacities. The District Court granted the voluntary dismissal and entered judgment accordingly against the City of Gary and the defendants in their official capacities. In a comprehensive opinion, the Seventh Circuit Court of

Appeals affirmed the judgment of the District Court on all issues, including damages and attorney fees, with respect to defendants Barnes and the City of Gary, and vacated the judgments against Comer, Ware and King, and directed the District Court to dismiss the suits against these three officials by virtue of Matlock's voluntary dismissal of these defendants in their individual capacities.

The defendants do not challenge the trial court's instructions or the jury's verdict rendered against Barnes and the City of Gary. Instead, the defendants again inappropriately raise their qualified immunity argument, rendered moot (and so held by the Seventh Circuit Court of Appeals in its order dismissing the consolidated interlocutory appeals of the defendants as moot, Appendix, pages B-1 to B-3, and again by the Seventh Circuit Court of Appeals in its order affirming the District Court's decision, Appendix, page A-13) by virtue of Matlock's voluntary dismissal of the defendants in their individual capacities, and further assert on appeal that Matlock occupied as a matter of law a policymaking or confidential position, assertions which were rejected by the jury at trial and by the Seventh Circuit Court of Appeals.

RESPONDENT'S REASONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISPOSING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND THE SEVENTH CIRCUIT DID NOT SANCTION ANY ABUSE OF THE DISTRICT COURT'S DISCRETION.

The defendants offer no legal authority whatsoever to support their charge that the Seventh Circuit Court of Appeals approved and sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings. Defendant's charge that the District Court improperly failed to rule on the qualified immunity issue is blatantly false. In its Order of October 23, 1989, the District Court extensively analyzed and discussed the defendants' qualified immunity argument and refused to enter summary judgment because: "As in any case involving a factual dispute, the actual duties of the investigator position must be resolved by the jury. Accordingly, special interrogatories will be submitted to the jury concerning the duties of the investigator. After the jury resolves any factual disputes, this Court will determine whether the defendants' conduct violated a clearly established law at the time the decision was made. *See generally Jones*, 856 F.2d at 994-995; and *Rakovich*, 859 F.2d at 1201-02. Therefore, summary judgment is inappropriate." Appendix, pages E-36-37. The Seventh Circuit did not find any abuse of discretion with the District Court's handling of this issue, nor have the defendants included in their petition any citation to statute, rule or case to

suggest that the District Court deviated from appropriate judicial procedure.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING MATLOCK'S MOTION TO DISMISS THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES AND THE SEVENTH CIRCUIT CORRECTLY DISPOSED OF THE DEFENDANTS' QUALIFIED IMMUNITY ARGUMENT AS MOOT.

The defendants further assert, again without any authority, that the District Court (and Seventh Circuit upon review) deviated from appropriate judicial procedure by dismissing the individual defendants upon Matlock's voluntary motion. No statute, rule or case is offered to show any impropriety, error or prejudice suffered by the individual defendants. As correctly stated by the Seventh Circuit, "A win is a win, however, and defendants cannot appeal from a judgment that is not adverse." Seventh Circuit Opinion, footnote 3, Appendix page A-13.

Contrary to the defendant's assertion that the District Court was in conflict with this Court's precedent on the issue of qualified immunity, there is no conflict because Matlock's dismissal of the defendants in their individual capacity rendered the issue moot, as correctly noted by the Seventh Circuit in its opinion. Seventh Circuit Opinion, footnote 3, Appendix page A-13. Moreover, since the defendants have not appealed from the jury verdict and judgment against the City of Gary and Mayor Barnes, the defendants have waived the issue of whether Matlock could be transferred, as opposed to fired, for his political beliefs and affiliations. The defendants cannot resurrect

through the qualified immunity argument (which is moot) an issue that defendants wholly failed to raise and preserve on appeal. ("The suits against Comer, Ware and King have been rendered moot by defendant's failure to appeal successfully from the jury verdict against Barnes and the city. The only suits remaining in this case are those against the officials in their official capacities . . . The jury found Mayor Barnes and the city of Gary liable for the politically motivated transfer[1] of Matlock, and the defendants do not successfully challenge these verdicts." Seventh Circuit Opinion, Appendix, pages A-13 and 14; citations and footnotes omitted.) Whatever the merits of defendants' argument regarding the legality of Matlock's transfer, defendants have wholly failed to properly raise it on appeal. Therefore, there is no issue properly presented in the defendants' petition to be decided by this Court.

III. THERE IS NO CONFLICT WITHIN THE SEVENTH CIRCUIT RESULTING FROM *MATLOCK* AND *HUDSON V. BURKE*, NOR IS *MATLOCK* IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The defendants incorrectly assert that a conflict now exists within the Seventh Circuit between the *Matlock v. Barnes*, 932 F.2d 658 (7th Cir. 1991) and *Hudson v. Burke*, 913 F.2d 427 (7th Cir. 1990) decisions, and invites this

---

[1] While defendants note the Seventh Circuit erroneously referred to Matlock's firing in footnote four of its opinion, it is clear in the text that the Seventh Circuit was cognizant of Matlock's transfer.

Court to settle the issue by holding that a legal investigator per se is subject to patronage dismissal and transfer, and specifically overrule the prior decisions in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); and *Rutan v. Republic Party of Illinois*, 110 S.Ct. 2729 (1990), 868 F.2d 943 (7th Cir. 1989). This Court should decline defendants' invitation for the reason that there is no conflict within the Seventh Circuit. A review of the Seventh Circuit Opinion in *Matlock* shows that the court was quite aware of its recent holding in *Hudson v. Burke* that legal investigators assigned to the Chicago City Council Finance Committee occupied a policymaking position and that political affiliation was an appropriate consideration for their hiring and firing. In reference to Matlock, the Seventh Circuit states specifically:

> "Defendants here utterly failed to introduce comparable evidence about the policymaking nature of the legal investigator's job in the city of Gary Law Department. Nowhere in the transcripts is there any suggestion that the Department regarded the settlement of the claims it handled as political matters. There was no evidence that the Department made policy or set goals for the city of Gary. The defendants' witnesses testified that the Department did not hire or fire on the basis of political affiliation generally, suggesting that city officials considered jobs within the Department to be non-policymaking. Matlock himself testified that he could not have been hired for his political affiliation because at the time he applied for the job, he had none. . . .

> The jury was in the best position to assess the credibility of the defendants' arguments about the need for secrecy in the Department, and its finding that Matlock's position was non-confidential as well as non-policymaking will not be overturned. Nothing in the record demonstrates that the legal investigator position was generally one for which political affiliation is an appropriate requirement. . . . " Seventh Circuit Opinion, Appendix, pages A-11 and 12.

The Seventh Circuit extensively contrasted and distinguished the issues and facts in the *Matlock* and *Hudson v. Burke* cases. The opinions are not in conflict, but are in fact complimentary by providing vivid examples of when an "investigator" is and is not a policymaking position. Defendants' suggestion that this Court make new law by ignoring the facts and basing the protection of Constitutional Rights of Free Speech and Political Affiliation merely on the job title that one is given is to invite this Court to sanction the wholesale abuse of these Rights for the sake of legal simplicity.

CONCLUSION

Matlock submits that the protection of Constitutional Rights of Free Speech and Political Affiliation from the well-documented abuses of patronage politics is not supposed to be simple. As this Court has pointed out in numerous prior opinions the issues involve a delicate balance between legitimate interests in efficient governmental policymaking and implementation and the protection of individual rights of speech and political affiliation.

The balance may be difficult to draw at times, but the importance of the competing interests at stake require the effort. The District Court and the Seventh Circuit Court of Appeals were correct in their decisions, and *Matlock* is not a departure from, but a clear and careful application of precedent from this Court and from the Seventh Circuit. There is no reasonable basis or compelling legal issue to warrant the granting of the defendants' Petition for Writ of Certiorari, and, therefore, the same should be denied.

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